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RECENT LEGISLATION IN MASSACHUSETTS.

The matters of the first importance among the recent acts of legislation in Massachusetts, are the changes in the Constitution of the Commonwealth, effected by the united action of two successive legislatures, and of the people of the State. Three amendments of the Constitution received the final sanction of a popular vote during the first session of the year's legislature. The first of these provides that hereafter no person shall have the right to vote, or be eligible to office, who shall not be able to read the Constitution in the English language, and to write his name. This provision, however, is not to apply to, or affect the rights of persons already voters, or those prevented by physical disabilities from complying with its requirements, or persons who may be upwards of sixty years of age at the time it takes effect. The purpose of this amendment, the object it proposes to effect is, of course, the exclusion from the polls of the most ignorant of our citizens, who are least qualified to exercise the right of suffrage; and this purpose is unquestionably wise; but the amendment itself is novel, and as yet an experiment. Whether it is of any practical value is yet to be seen. The other amendments provide for districting the State for the choice of senators and representatives, and for the reduction of the members of the house to two hundred and forty, and of the senate to forty. This change seemed imperatively demanded by the large and constantly increasing number of towns in our Commonwealth, which made the house of representatives unwieldy, and

unnecessarily expensive, while at the same time it left many of the smaller towns unrepresented for a great part of the time. Still we cannot but regret the loss of our old system of town and county representation, a system borrowed from our English ancestors, and older than the Commonwealth itself.

The number of acts passed this year is somewhat less than that of the last legislature. There is, however, the same cause for complaint, to which we annually recur; the legislation is hasty, careless, and clumsy. Thus there are no less than four separate acts relating to the government and management of the State-prison, which might easily have been consolidated into one. So there are very numerous separate acts relating to the police courts of Lowell, Framingham, and other towns and cities separately, and by name, which might have been better provided for by one general law. The laws relating to imprisonment for debt, to the exemption of the homestead, and of certain specified articles of property from attachment and levy, have been revised, and yet these same subjects received a very thorough overhauling at the hands of the legislature of 1855. These are merely illustrations taken at random from the official publication containing these laws. To what extent the community suffers from hasty and incomplete legislation, may be inferred from the fact that eighteen of the acts of the legislature of 1855, twelve of those passed last year, and two acts passed by themselves, the present legislature found it necessary expressly to modify, add to, or repeal; while the number of statutes whose operation is less directly affected by their proceedings is, of course, much greater. We have already alluded to this matter in former years, and have hinted at some remedies which might be of service. It is, however, a subject very difficult to deal with; and we fear no remedy, however skilful, will ever be applied until our legislators themselves, and the body of the people from whom they come, feel practically and directly the difficulties and embarrassments of this reckless legislation.

The most important acts of this legislature, having reference to the practice of the law, are, first, that which gives the supreme court jurisdiction in equity, in all cases, where there is not a full, complete, and adequate remedy at law, thus granting without opposition, and almost *sub silentio*, what was for many years a violent bone of contention in our State legislature. Second, the act dispensing with juries, by the consent of parties, in all civil actions,

leaving it to the court to decide the whole case, — the facts with the law. This act makes the courts, at the option of parties, statute referees. It is in conformity with the practice in courts of equity and admiralty, where a single judge determines both the facts and the law. This system is popular with those familiar with it, and is thought to ensure justice quite as fully as our jury trials; and certainly the decision of one man accustomed to weigh evidence, and to reconcile and settle differences and discrepancies, is as likely to be right as the verdict of twelve men unused to such labor, and drawn indiscriminately from their various avocations and placed in the jury box. The policy of permitting parties to be witnesses in their own cases, inaugurated by the legislature of 1855, has been further extended by chapter 305 of the acts of this session. This act is perhaps rather declaratory than otherwise. It extends the rights of parties to testify in their own behalf, to all civil suits and proceedings, including probate, insolvency, and equity proceedings, and actions for divorce, when not founded on alleged criminal conduct of either party; it renders husband and wife competent witnesses either for or against each other, when the wife is a party to the action, and provides that the depositions of all persons thus made competent, may be taken in the same manner as those of any other witnesses. The experiment of allowing parties to testify in their own causes, is yet too recent to enable us to judge with accuracy what will be its results; whether it is likely, in the long run, to diminish litigation, and to promote the cause of justice or not. But so far as we are aware, the persons who have had the best opportunities to witness its practical operation are unanimous in praise of it.

The act relating to imprisonment for debt is rather declaratory of the existing law in this State, and an attempt to codify the various statutes on this subject, than the enactment of any new rules respecting the arrest of debtors. It confirms and reënacts, so far as the essential requirements of an arrest are concerned, the policy inaugurated by the legislature of 1855. This policy is a policy in favor of the debtor, and against the interests of the creditor. It has never found favor with us, nor do we think it has with the better part of the community, who wish and intend to pay their debts. We believe that the law for the arrest of debtors, as it stood in the revised statutes, was a law which, while it sufficiently guarded the honest debtor, protected

much more fully and satisfactorily than the present law, the rights of the creditor; that the changes introduced by the act of 1855, were a departure from the true principles, or at the least an uncalled-for alteration in a law working excellently in practice, and that a recurrence to the old system would be the true policy, and would find favor with the honest men of all classes in the Commonwealth. The act to exempt articles from attachment is chiefly a consolidation of the existing acts upon this matter, but also diminishes to some extent the amount of property exempted.

The act to exempt the homestead of a householder from levy or execution, which is an act *in pari materia* with those we have been considering, has received several useful modifications. The act of 1855 upon this subject, was drawn with such looseness, and want of care, that it was exceedingly difficult to advise purchasers of real estate, and more especially of houses, when their title was good, and they were released from all the possible claims under this statute. The deeds which passed one conveyancer were in danger of rejection by another as insufficient; and the act was so general and indefinite as to the quality and quantity of the estate exempt, the rights of the wife and children therein, &c., &c., that no lawyer could pronounce with any certainty upon its meaning. The purpose of the present act was to remedy these defects, and to define the extent and nature of the homestead exemption, the method by which it was to be secured and ascertained, and the rights of various parties, the wife, the children, the husband, and his creditors therein. The third section of the act provides that the deed of purchase, or in case of estates already purchased, a writing sealed, acknowledged, and recorded, must set forth the design of the parties to make the estate their homestead, and that no such right shall be acquired in any second parcel of real estate until the first right shall have been discharged by the owner, with the wife's consent expressed in the deed. There are provisions for the wife's release of her right, specifying in what manner it is to be done, and in case of her incompetency, for the appointment of a guardian to act for her. There is also a provision by which any conveyance of property thus exempt, made by the husband without the joinder of his wife, is valid, subject to the wife's right; while the old statute made the conveyance void unless the wife joined.

There are several other acts which we had marked for a

more extended notice, but to which we can only direct the attention of our readers. Among these is an act, the first of its kind we believe in this Commonwealth, with reference to the rights and duties of the trustees under railroad mortgages; a statute providing for the perpetuation and admission of evidence of the due execution of the power of sale in a deed of mortgage; various laws relating to horse-railroads; an act permitting the children of non-residents to attend the public schools of a town upon certain terms and conditions. We have no space for further enumeration, and perhaps have already devoted too much room to a subject so entirely local in its interest and importance. There is, however, one statute against the provisions of which we wish to enter our protest, as wrong in principle, and an act of legislative injustice. At the legislative session of 1856, the whole system of insolvent laws underwent a careful revision, and was in some respects materially altered. The duty of administering this system, previously confided to commissioners, was assigned to judges, to be appointed in the same manner, and to hold office upon the same terms, as the other judicial officers of the Commonwealth. The act providing for the appointment of these judges, also fixed their salaries. At this session, so much of this law as related to the salaries of the various officers, was re-considered. The salaries were in most cases increased; but in three instances they were lowered. The arguments for these reductions have never reached us; and the reductions themselves are in our opinion wrong, and ill-judged. The policy of reducing the salaries of judicial officers, though not without precedent in the history of legislation in Massachusetts, is not in harmony with the spirit of the Constitution of the State. Its propriety has never been admitted, and the similar action of previous legislatures has signally failed of success. The present act is less injurious, only because it is so limited in its operation. To the officers whose salaries are reduced, it is unjust and unfair. And it should be remarked that the bill was passed against the remonstrances of those best qualified to speak of the capacities and qualifications of these officers, and the amount of official labor required of them.

Since the first part of the above article was written, there has been an adjourned session of the legislature, and measures have been perfected for putting into immediate operation the constitutional amendments of which we

have spoken, providing for districting the State and reducing the numbers of both branches of the legislature. The citizens of the Commonwealth will, therefore, have a speedy opportunity of testing the practical advantage of these changes.

THE CIVIL DISCORD IN NEW YORK.

It would perhaps be considered out of place here, to discuss the political bearings of the controversy, which, for several months, has kept in convulsion the great commercial metropolis of the Union. We propose, however, to review briefly the action of the courts, noting as we pass along the most prominent points in the arguments of counsel, and the decisions of judges.

THE METROPOLITAN POLICE ACT.

This is entitled "An act to establish a metropolitan police district, and to provide for the government thereof." It was passed April 15, 1857. It organizes the counties of New York, Kings, Westchester, and Richmond, into a district, to be called "The Metropolitan Police District of the State of New York," and directs the appointment of five commissioners by the governor and senate, who, with the mayors of the cities of New York and Brooklyn, *ex officio*, are to form a board of police commissioners. Such board is authorized to appoint various officers to aid them in preserving order, and performing the duties imposed upon them by the said act.

Fernando Wood commenced an action in the supreme court against Simeon Draper, James Bowen, James W. Nye, Jacob Cholwell, and James S. T. Stranahan, who had been appointed police commissioners under the Metropolitan Police Act. He alleged that he was a tax-payer in the city of New York and one of the corporators thereof, and prayed that the defendants should be restrained from the execution of the statute in question, on the ground that it was unconstitutional and void. A preliminary injunction against the defendants was granted by Judge Davies, April 21. The motion to make the injunction permanent was however denied, and the order for the preliminary injunction vacated by the same judge, April 29. His Honor in rendering his decision passed by the question of constitutionality,

and dismissed the complaint on the technical ground, that the plaintiff had omitted to aver that he sued, not only in his own behalf, but also in behalf of all others similarly interested. "Such an averment," said his Honor, "is essential to a complete determination of all the rights affected by the suit." See *Lloyd* v. *Loaring*, 6 Ves. Jr. 773; *Cockburn* v. *Thompson*, 16 Ib. 321; *Good* v. *Blewitt*, 13 Ib. 397; 1 Barb. 19; 15 Ib. 193, 244; 16 Ib. 392.

An action in the nature of a *quo warranto*, was instituted by the attorney-general, April 25, in the name of the people, on the relation of Fernando Wood, against the Police Commissioners, and on the same day an injunction was granted by Judge Roosevelt, of the supreme court, based on the complaint, and an affidavit of the relator. This injunction was afterwards dissolved by Judge Peabody, also of the supreme court, on the ground that where an action of *quo warranto* is brought, to test, not the validity of the office, but the title of the defendant to hold and exercise it, a preliminary injunction restraining the defendant, pending the suit, from exercising the office, cannot be granted.

The *quo warranto* was brought to a hearing before the general term of the supreme court, on a demurrer put in by the plaintiffs to the defendants' answer, — the answer setting forth the Metropolitan Police Act, and the appointment of the defendants in pursuance thereof, and the plaintiffs relying in their demurrer, upon the unconstitutionality of the said act. The case was argued on the part of the plaintiffs by Charles O'Conor, on the part of the defendants by David Dudley Field. A majority of the court, comprising Judges Mitchell and Peabody, overruled the demurrer, and sustained the constitutionality of the act. Judge Roosevelt dissented.

An appeal was taken directly to the court of appeals at Albany, where the case was re-argued on the part of the plaintiffs by Charles O'Conor and ex-judge Edmonds, and on the part of the defendants by Francis B. Cutting and William M. Evarts. On the second of July the court of appeals rendered their decision, affirming by a majority of six to two, the decision of the supreme court, and pronouncing the act in question constitutional.

The appellants based their objections to the law, mainly upon its supposed repugnancy to the second section of the tenth article of the Constitution of 1846, which reads as follows: —

"All county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the

respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers whose election or appointment is not provided by this Constitution shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for *that* purpose. *All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct.*"

His Honor, Chief Justice Denio, delivered the opinion of the court. He first gives an outline of the provisions of the act in question, and then proceeds to consider the question whether the terms *county officers*, and *city*, *town*, and *village officers*, as they appear in the section above quoted from the Constitution, are limited to such officers whose offices existed at the time of the adoption of the Constitution, pursuant to the laws of the State then in force ; or whether they include those whose offices might thereafter be instituted. He concludes this part of the subject as follows : —

"When in this section it [the Constitution] speaks of *county officers*, and of *city*, *town*, and *village officers*, whose election or appointment is not provided for by the Constitution, and declares that they shall be elected or appointed by the local divisions to which their offices appertain, it refers to offices instituted and existing under the actual laws of the State. So in the next member of the sentence where 'all other officers whose election, &c., is not provided for by this Constitution,' are spoken of, the reference is equally to existing officers. This becomes apparent by that which follows : 'and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct.' This language embraces all offices thereafter to be created, whether their functions are local or general. By giving it this, its natural interpretation, and considering the previous clauses as confined to existing offices, the provision is intelligible and harmonious ; but if the clauses are not so limited, there is an inevitable repugnancy. On the opposite construction we have a mandate that all existing local offices, and all offices which may be thereafter instituted, shall be filled by a local constituency, and at the same time a direction that those thereafter to be instituted shall be filled as the legislature shall direct. It will be perceived that four classes of officers are referred to in the section ; first, those whose election or appointment is provided for by this Constitution — these are named only to be excluded from the direction to be given ; second, existing local officers — the then present county, city, town, and village officers — these are to be chosen by constituencies in their respective localities; third, all existing officers

whose election, &c., is not provided for by this Constitution, and who are other than county, city, town, and village officers; and fourth, all officers of every description, local or general, whose offices were to be thereafter created by law — these two classes are thrown into one, and the legislature is left free to provide for their election or appointment as it shall think most suitable. It follows from what has been said, that if the offices mentioned in the Municipal Police Bill have been created since the adoption of the Constitution, the fact that they are filled by appointment by the governor and senate, is not a violation of the portion of that instrument which we have been considering."

His Honor afterwards expresses the opinion, that if the provisions of the statute in question, had been limited territorially to the city of New York, it would have been in conflict with the section of the Constitution referred to, inasmuch as the functions to be exercised by the officers appointed under the statute, would have been substantially the same as those exercised by various city officials, anterior to the adoption of the Constitution. "It is not enough," says he, "to take the case out of the provisions of this section, that the names of offices existing when the Constitution was adopted, were afterwards changed by an act of the legislature, or their functions colorably modified. The Constitution regards substance and not form."

His Honor then proceeds to answer the objection of the appellants that the legislature cannot constitutionally establish a new civil division of the State, for general and permanent purposes of civil government. We make the following extracts: —

"It cannot be denied that an act of the legislature which should propose to abolish counties would be hostile to the arrangements of the Constitution." . . . . . "Cities and towns are also included in and are indispensable to the carrying out of the arrangements of the government as organized by the Constitution. But there is nothing in it which requires that these local divisions should always possess the same measure of constitutional power, or that local functionaries should always exist within them possessing the same functions as when the Constitution was adopted." . . . . . "But the act under consideration does not propose to abolish any of these divisions. On the contrary, the existence of counties and cities embraced in the Metropolitan District are recognized; and their continued existence is as essential to the arrangements of the act as to the working of the Constitution itself. No subordinate officers or patrolmen of the police force can be appointed, and no funds for their payment can be furnished without the co-operation of the county and city authorities. Counties and cities then are not subverted by this act. Nor can I perceive that any arrangement of the Constitution which looks to the existence of counties

or cities or the co-operation of county or city authorities, is broken in upon, or in any respect interfered with by the bill."

His Honor afterwards addresses himself directly to the objection founded upon the section of the Constitution above quoted, which objection is as follows: —

"To establish such a district, and to organize therein officers for the appointment, regulation and government of a police force, and a body of public officers and policemen, deriving their appointment from the central authority of the State, is hostile to the power of election and appointment conferred upon counties and cities by the said section of the Constitution."

His Honor disposes of this objection as follows: —

"It is said that, by the provisions of the act, the local constituency of the city of New York is deprived of the rights secured to it by the second section of the tenth article of the Constitution already quoted. It is suggested that the Constitution is to be taken to have assumed the subject of police to be localized in the several cities and counties. Then as its administration was committed to certain city and county officers when the Constitution was framed, and the second section above mentioned determined, in effect, that these county and city officers should forever thereafter be elected or appointed by a local constituency, it is argued that no change can be made by the legislature by which that constituency can be deprived of the franchise of choosing its officers of police. This position would be unassailable, if it could be maintained that the subject of police had by any constitutional provision or arrangement been irrevocably committed to the counties and cities. But there is nothing in the Constitution directly touching the subject of police. If such a provision exists, it must, therefore, be an implied one; and nothing is suggested from which it can be implied, unless it is the provision that county and city officers shall be chosen in the counties and cities. But this does not prove that the then existing functions of county and city officers were always to continue to exist and to be performed in the cities and counties. No one will contend that the legislature could not abolish the office and the functions of any officer whose office was not a constitutional one, but was one created simply by a legislative act. Should they determine to-day that the office of public administrator, or street commissioner, or any other officer whose office was not established by the Constitution, had become unnecessary or useless, they could abolish the office and the function together. Should they determine that the functions of public administrators, for instance, should be no longer local, but public convenience would be promoted by establishing an office having the same powers, with a jurisdiction co-extensive with the State, there is nothing in the Constitution to prohibit such an act of legislation. But suppose it should be considered that public convenience would

be promoted by the establishment of such an office, with jurisdiction over the maritime counties of the state. In neither case, as I conceive, would there be any constitutional objection to giving effect to the views of the legislature, by an act which should enlarge the territorial jurisdiction and change the mode of appointment. The local constituency would in the cases supposed become inapplicable. The constitutional provision would no longer meet the case, and it would be left to the legislature to provide such mode of appointment as it should judge expedient. Now, in the case before us, the legislature must be considered to have determined that public convenience and the public good would be promoted by abolishing the local character of the police of the four counties mentioned in the bill, and creating a new jurisdiction embracing them all. The defendants' counsel explained the strong public necessity which he supposed there was for the new arrangement. With this question we have nothing to do; but, certainly, it is not impossible to suppose that there might be adequate public motives for the consolidation of the police force of the four counties. If such motives could in the nature of things exist, we are to assume for the purposes of this question that they did exist."

In the course of his opinion, his Honor adverts in the following language to the charge against the legislature, that the new police district was so formed as to include three counties outside of New York, for the express purpose of evading the Constitution.

"If a particular act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the Constitution; but whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of necessity or public expediency which the legislature may have entertained, the law cannot be challenged in the courts."

We have only one more extract to make, and this relates to the point urged with so much earnestness by Mr. O'Conor, that the act in question conflicts with the spirit of the Constitution, and the intention of its framers. The language of the court is as follows: —

"It has been said that a tendency may be discovered in the Constitution towards local admistration and in favor of decentralizing, as it is not inaptly called, the powers of government, and that a policy in that direction, more marked than in any of our former systems is plainly to be traced in several constitutional provisions. This I believe to be true. So far as the convention proceeded in that direction, it is for the courts to follow; and it may be that in the construction of doubtful provisions regard should be had to this political tendency. But we cannot in furtherance of such a supposed policy, however plainly it may be perceived, create exceptions or restraints on the legislature which are not fairly contained in the Constitution as it is written. It may be the duty of the legislature to follow out or advance such a line of policy; but the business of the courts is with the text of the fundamental law as they find it. The courts have no political maxims and no line of policy to further or to advance. Their duty is the humble one of construing the Constitution by the language it contains."

THE STREET COMMISSIONERSHIP.

MAYOR WOOD'S CONTEMPT.

Already, before the announcement of the decision of the court of appeals, the dispute in reference to the office of street commissioner had disturbed the peace of the city and led to the shedding of blood. The most material facts of the controversy are as follows: —

Joseph S. Taylor was elected to the office of Street Commissioner of the city of New York in November, 1855, to hold for three years; he went into office on the first day of January, 1856, and continued in office till the 9th of June, 1857, when he died.

On the 12th of June, Daniel D. Conover was appointed by the governor in due form to fill the vacancy. The governor, as it seems, acted upon the advice of Nicholas Hill, the distinguished practitioner before the court of appeals at Albany. Mr. Hill's opinion is as follows: —

"I have examined the question whether the existing vacancy in the office of Street Commissioner, in the city of New York, may be supplied by an exercise of the appointing power vested in the governor, and have arrived at the following result: —

1. No power over this vacancy is given to the mayor and board of aldermen by the 19th or any other section of the amended charter. Even the power of appointment given by that section was not to take effect, in respect to this office, until the expiration of the term of the deceased incumbent (§ 51). The cases, moreover, in which the power to fill vacancies was intrusted to the mayor and aldermen are expressly designated, and their right to

fill them in cases *not* designated, is thus excluded by implication (§ 20).

2. I know of no special enactment or other law authorizing the filling of this vacancy except the statute passed February 3, 1849, (Laws of 1849, § 28,) and it seems to me that the case comes fairly within the power there given to the governor.

Signed, NICHOLAS HILL."

On the 13th of June, Conover took the oath of office required by law, and filed it with the proper officer. He also executed on the same day, and filed with the proper officer, on official bond, with two sureties, in the penal sum of $10,000. This bond, however, had not been approved by the mayor. Conover then proceeded to the rooms belonging to the city, occupied as the office or place of business of the street commissioner, entered them, claimed that he was street commissioner, exhibited his commission to Turner, the deputy street commissioner under Taylor, and the employees, and asserted authority over them and the business of the office, and, placing himself at a desk, offered to perform and did, in one instance, at least, perform official business as street commissioner. He remained there, claiming to be in possession of the place and business, by virtue of his office, until the usual hour of closing the place for the day, when he left, as the place was closed.

On Monday, June 15th, he returned, resumed his place and official position, and remained some time there at his desk, at the place properly occupied by the head of the department, as he claimed to be. In the course of the day he was removed forcibly from the rooms by Captain Bennett, acting as deputy sheriff, and assisted by other persons. Conover returned next day, the 16th, and was again ejected by Bennett. On the same day he commenced an action in the superior court against Mayor Wood, Sheriff Willett, Deputy Street Commissioner Turner, who had throughout refused to recognize his authority, and Captain Bennett. He charged Bennett with assault and battery, and alleged that he acted under the advice and direction of the other defendants, who, as alleged, procured the said assault to be committed, and aided and abetted therein. Upon the complaint of Conover, and his separate affidavit, Judge Hoffman granted a warrant for the arrest of the defendants, directed to the coroners of the city and county of New York. This warrant was put into the hands of Coroner Perry, who after having tried twice in vain to get access to the mayor finally succeeded in serving him with the process. On

the 18th of June, Judge Hoffman, upon the affidavit of Coroner Perry, granted an order requiring the mayor to show cause on the 23d of June, why he should not be punished as for a contempt. The following is the affidavit of the coroner: —

"*City and County of New York, ss.*

Frederick W. Perry, of said city, being sworn, saith, that he is one of the coroners of the said city, duly elected, residing in said city, and exercising the duties of his office as such coroner, on the 16th day of June, instant; that the order of arrest, of which the annexed is a copy, was delivered to deponent for execution on the said 16th day of June; that he immediately repaired with said order to the city hall, for the purpose of arresting the defendant, Wood, thereunder; that he went to the door of the outer office of said Wood, when admission to said office was at first refused him, but on deponent's stating that he was such coroner and had official business with said Wood, deponent was admitted within said office and up to the railing within the same, where he was met by a person belonging to the so-called municipal police, who denied him admission to the inner room where the said Wood then was as deponent is informed and believes, that deponent then announced his business, that he was such coroner, and had said order of arrest for execution; that thereupon a messenger went into said inner office to inform said Wood of deponent's business; that deponent does not know the name of such messenger, but he was also a member of said municipal police; that the said messenger returned almost immediately, and thereupon one Ackerman, formerly police captain, and who, as deponent believes, came out of the private office of said Wood, came to deponent and told him that the mayor's orders were that deponent should be turned out of the room, whereupon he instantly seized deponent, and, after a little resistance on his part, forcibly and violently ejected him from the apartment, and thus for the time entirely defeated the service of the said order of arrest. That deponent was obliged to, and did thereupon, invoke the aid of the military, which was furnished him, and that by means of such assistance he was enabled to make the service which he could not otherwise do, on account of the resistance of the said Wood and the said Ackerman to the execution of the process.

F. W. Perry.

Sworn before me, June 17th, 1857.

John F. Gray, Commissioner of Deeds."

The mayor in his counter-affidavit, produced on the 23d before Judge Hoffman, at the hearing upon the order to show cause, denied that he wilfully or designedly resisted the service of any process of the court, and said further that as soon as he heard that said Perry had process to serve upon him, he sent for Perry and

voluntarily offered to have the process served. The mayor admitted that upon Perry's first visit to his office, his messenger opened the door of his private office, and announced the name of Perry, but the mayor swore further that the messenger did not say anything about the nature of the business on which Perry desired to see him. The affidavit of the mayor also set forth, that if Perry was forcibly ejected from his office, it was without his knowledge or assent, &c., &c. Several other affidavits in confirmation of that of the mayor were read, after which Mr. Field asked for a reference to take proofs of the facts, on the permission to examine Wood and others on oath. The motion for a reference was opposed by the mayor's counsel, Ex-Judge Dean. On the 25th of June, his Honor, Judge Hoffman, refused the reference, and discharged the order to show cause. The order had been made in pursuance of the provision of the Revised Statutes, which authorizes the court to punish for contempt in case of "resistance wilfully offered by any person to the lawful order or process of the court." The mayor's counsel insisted that the case was not within the statute, that the order or process must be served before the case of resistance can arise. But his Honor thought otherwise. He expressed the opinion that when a party knows of the existence of an order in the hands of an officer to be served upon him, and wilfully prevents that service by open force made or directed, the resistance is as fully within the statute, as if he had received and contemned it. His Honor thought that the order to show cause had sufficient foundation, and yet that the affidavits on the part of the defendant, had made out a case exonerating him from either the act of resistance or the intention to resist. "The inquiry," said he, "and the only pertinent inquiry, is, whether the defendant knew of the coroner having an order to serve upon him, or whether there are facts enough deposed to make him chargeable with such knowledge." His Honor concluded that, in such a case, when the court is satisfied that no contumacy of its order took place, and the papers before it make this out free from doubt, a further investigation is not allowable.

PROCEEDINGS AGAINST DEVLIN.

On the 19th of June, proceedings were instituted on behalf of Conover against Devlin, under the statute which authorizes proceedings for the delivery of the public books and papers in the office, to the successor of any one dying or otherwise vacating

such office. On that day the petition of Conover, duly verified by himself, was presented to Justice Peabody, setting forth the appointment by the governor, the acceptance of the office by the petitioner, the possession of the books and papers by Devlin, and his refusal to deliver up the same, claiming himself to be the street commissioner, under an alleged appointment to that office by the mayor and aldermen of the city. On this petition an order to show cause was granted by Justice Peabody, and on the hearing upon this order, the affidavits of Conover and Devlin were read, and various witnesses were examined, among them Mayor Wood and Sheriff Willett. Messrs. Field and Nôyes argued the case for the petitioner; Messrs. Brady and Busteed opposed. Justice Peabody rendered his decision, July 8th. He refused to pass upon the question, so elaborately discussed by counsel, as to which of the two claimants was entitled to the office. We extract the following from his opinion: —

"It was never intended by the legislature to authorize a justice of this court sitting here to decide in effect the title to an office. If there is a reasonable doubt as to who is entitled, it should be decided in a direct proceeding for the purpose — an action of *quo warranto*, which is with us the substitute for the old writ of that name.

"This is a proceeding to get present possession merely of the books and papers incident to an office, not of the office itself, and it should not be allowed to answer that end practically, which it would do if the books and papers necessary to the functions of an office are to be awarded a party on his merely showing a title to the office itself. In these views I find myself sustained by authority, and among others by the case of *The People* v. *Stevens*, 5 Hill, 616, and the opinion of Judge Kent, reported at page 631 of the same volume, and that of Justice Edmonds in the *Matter of Whiting*."

His Honor concluded as follows: —

"The rights of Conover, acquired by prior possession, can only be divested by legal measures. These measures have not been applied, and his rights remain. Being in possession, he was the officer *de facto*, and until ejected — which can only be done by process of law — he has all the rights incident to possession with color of title. It follows that Conover is entitled to possession of the books and papers, and to have them delivered to him under this proceeding."

July 10, Justice Peabody granted an order, directing Devlin to surrender the books and papers to Conover, or in case of his default, that a warrant issue to commit him to jail, and also, in

case of his default, that a search-warrant issue for the books and papers. The order was served upon Devlin, who was in court at the time. He refused to comply with it, and the warrants were then presented to Justice Peabody for his signature. Before, however, he had actually put his hand to the warrants, and while counsel were disputing as to the capacity wherein he was sitting, whether as judge of the supreme court or merely as a commissioner under a special statute, a writ of *certiorari* was served upon him, removing the proceedings into the supreme court. This writ had been obtained the same morning from Justice Davies, who, as it seems, allowed it, under the misapprehension that Judge Peabody's duties were already discharged and ended. With the application for the allowance of the writ, there was also an application for a stay of proceedings. This he refused, because he thought it was improper. He allowed the writ, to bring up the proceedings to the general term for review. Mr. Brady, however, took advantage of the writ, and argued before Judge Peabody that it operated as a stay of proceedings, and that he could not sign the warrants in the face of it. Mr. Brady also insisted, that Judge Peabody could not proceed, without setting at naught the temporary injunction upon Conover, granted June 27th, by Justice Roosevelt of the supreme court, upon the complaint of the mayor and aldermen and commonalty of New York, restraining Conover from taking into his possession or interfering with the books, papers, &c., of the street commissioner's office. Judge Peabody reserved his decision as to the effect of the *certiorari*, and the injunction till July 13th.

On the 13th, Judge Roosevelt denied the motion to make the injunction granted by himself against Conover permanent. The temporary injunction was accordingly dissolved. At the same time Judge Peabody decided that his proceedings were stayed by the *certiorari* allowed by Judge Davies, and that, too, notwithstanding an explanatory order, granted by Judge Davies on the 11th, to the effect that the *certiorari* should not be deemed a stay of proceedings. On the 18th the *certiorari* was vacated by Judge Davies, and a writ of *supersedeas* issued to Judge Peabody, who without delay, his hands being thus untied, signed the warrant of commitment, and also the warrant of search, and on the same day, (July 18th,) Devlin was lodged in the Eldridge Street jail.

On the 21st of July, Devlin was brought before Judge Ingraham of the court of common pleas, upon a writ of *habeas corpus*. The

whole subject of the jurisdiction of Judge Peabody and title to the office of street commissioner was again discussed. Judge Ingraham reserved his decision until August 5, when he discharged Devlin, on the ground that the facts stated in Conover's petition to Judge Peabody, were not sufficient to confer jurisdiction. He insisted that the special proceeding under the statute for the delivery of books and papers, could not be resorted to, until it had been decided who was the party legally entitled to the office, and that this could be done only on a *quo warranto*. He cited the opinions of Bronson and Kent in *People* v. *Stevens*, 5 Hill, 615, of Willard in *Matter of Carpenter*, 7 Barbour, 37, and of Edmonds in *Matter of Whiting*, 2 Ibid. 518, as authorities for the position, that the statute was only intended to be used for a person having a clear and undoubted title to the office, and not where the claimant's title to the office was doubtful, or where more than one claimed a right to the possession of the books and papers, by virtue of an appointment to the office.

His Honor then proceeded to show that the governor had no right to appoint Conover, and that the appointment of Devlin by the mayor and aldermen was valid. The office of street commissioner was not a new office, like that of the metropolitan police commissioners, it having been in existence ever since the year 1830. It was therefore not subject to the provision of the Constitution, which left it discretionary with the legislature, to direct how the offices thereafter to be created by law should be filled. Furthermore it was a purely local office, and a city office, and sustaining that character, the second section of the tenth article of the Constitution applied, requiring that all city and county offices, not otherwise provided for therein, should be elected by the electors, or appointed by the local authorities, as the legislature should direct. The fifth section of the same article, which directs that the legislature shall provide for filling vacancies in office, must be read in connection with the second section. The governor claimed the power of appointment under act of 1849, which authorized the governor, whenever any vacancies should occur in any of the *offices in this State*, where no provision was made by law for filling the same, to fill such vacancy until the commencement of the year after the next annual election, at which such officer could be elected. There were two objections to the application of this statute to the office of street commissioner. First, it was not an office of the State; it was not so recognized in the

Revised Statutes, (which, vol. 1, p. 96, designate and classify the various offices of the State,) although in existence at the time of their passage, nor was it recognized in any statute as a State office. In the second place, such an officer, by the Constitution, could only be appointed by the local authorities, or elected by the people, and the power to make the appointment could not be vested in the governor. This is conceded by the judges of the court of appeals in the case of the police commissioners.

His Honor next proceeded to show that the power of appointment in this case was conferred by the new charter upon the present mayor and aldermen. This charter took effect on the first of May. Section 19 provides that the mayor, comptroller, and council to the corporation shall be elected, and that other heads of departments shall be appointed by the mayor, with the advice and consent of the board of aldermen. The question is, as to whether this power of appointment applies to the mayor now in office. By section 54, all other charters except the Dongon and Montgomery charters are repealed. If the powers conferred by the new charter are only to be exercised by the officers who may be elected under it, we are forced to the conclusion that there is no authority for any city government. It is true, by the 51st section, the present officers are continued in their offices; but, unless under this statute, these officers (the aldermen and councilmen) could not pass any ordinance or do any legislative act. The board of councilmen is not included in either of the old charters, and possesses no powers not conferred by this charter.

His Honor continued as follows:

"The argument on the part of the respondent is that the power of appointment conferred by section 19 is confined to the mayor and aldermen to be elected under the charter, and not to those in office. If this be so, then the argument applies to the aldermen and councilmen, as section 2 vests the legislative power in the board of aldermen and councilmen, and section 3 provides for their election in entirely different districts from those now represented by these officers; no more power to act at this time under the charter is given to these officers than to the mayor and aldermen in regard to appointments, and the same section which continues the present aldermen and councilmen continues the mayor in office. Unless they can act under this charter, all legislation during the year is a nullity, and if the common council can act and perform the duties provided for in this charter, the same right belongs to the mayor and board of aldermen in regard to appointments."

We present the following analysis of the remainder of the argu-

ment: By section 20 of the new charter, the comptroller and counsel to the corporation, may each be removed by the governor, and the vacancy be filled until the next annual election, by the mayor, with the advice and consent of the board of aldermen. By section 21, the mayor with the advice and consent of the board of aldermen, or the board of aldermen by a two-third vote, without the consent of the mayor, may remove any of the heads of departments, except the comptroller and the counsel to the corporation. By section 49, the grand jury may present any officer other than mayor, counsel to the corporation or comptroller, created by or holding office under this charter, and such presentment shall be tried in the same manner as an indictment, and if the officer shall be found guilty of any charge contained in the presentment, the court shall declare his office vacant. Now if it can be shown that sections 20, 21, and 49, apply not only to officers to be elected under the new charter, but also to those holding office under the old charter, it follows that section 19, which confers the power of appointment upon the mayor, with the advice and consent of the board of aldermen, has the same application. That sections 20, 21, and 49 do have such an application, may be seen from section 51. This section directs that the election of the mayor, aldermen, and councilmen, provided for in this act, shall be held on the first Tuesday of December, 1857. It then continues as follows: —

"All persons who shall have been elected under former laws regulating or effecting the election of charter officers, and shall be in office at the time of the passage of this act, shall continue in office until the officers elected under this act shall take office, and no longer, except that [here follows an exception that has no application to this subject], and except that the persons now filling the several offices of comptroller, counsel to the corporation, street commissioner, and city inspector, and the officers of the Croton aqueduct department, shall continue in office until the expiration of their several terms, and shall not be removed from office during such continuance, *except for the cause and in the manner provided for* in sections 20 *and* 49 *of this act.*"

Under this provision, Street Commissioner Taylor, having been elected last fall for three years, would have held his office until January, 1860. It will be seen from the language at the beginning of this extract, that the exception in italics at the end, applies only to those in office under the old charter. The exception exempts the officers before mentioned from the operation of section 21, and proves that this section as well as sections 20 and 49, were understood by the framers of the law to apply to those in

office under the old charter, as well as those to be elected in future. The exception proves the rule that sections 20, 21, and 49, taken by themselves apart from the exception, apply to those in office. It may also be observed that of these sections, the 20th provides expressly that in case of removal of the comptroller or counsel to the corporation, the vacancy can be filled by the mayor and aldermen. Should such removal be made during the present year, the city would be left without any such officers, unless their places could be filled by the present mayor and aldermen.

E. F. H.

THE LATE ALEXANDER H. LAWRENCE, OF WASHINGTON.

To many of the readers of this journal, the name which stands at the head of this article will need to be accompanied by no remarks, either of information or eulogy. Others know only that on the 16th of March last, there died in the city of Washington an eminent lawyer, at the early age of forty-six, who from the comparatively humble position of a clerkship in one of the public departments, rose to the highest ranks of our profession, to a large practice at the bar of the supreme court of the United States, and to the universal favor, confidence, and respect of the community in which he lived. That community, at the time of his decease, spoke through many different organs its sense of the loss it had sustained, in a manner most honorable to the memory of Mr. Lawrence. His character and abilities were entirely worthy of all the praise that was so feelingly bestowed by his bereaved associates and neighbors; and we should omit a duty, if we did not, at the earliest practicable moment, record in our pages some brief account of a lawyer so much distinguished by moral and intellectual endowments of a very high order.

Mr. Lawrence was a native of New Hampshire, where his parents still live. At an early age, in the year 1834, we believe, after he had left college, he went to Washington to take charge of a school, at the head of which he continued until the autumn of 1836, at which time he was appointed a clerk in the General Land Office. A member

of the Washington bar has thus described him at this beginning of his career in that city: —

"I was one of the boys assembled in his school-room on the morning he made his first appearance there, and one who participated in the exercises which terminated his authority, but not his influence over us. His ripe scholarship and cheerful willingness to teach, his constant readiness to answer our many questionings, his kindness and amiability won for him the respect, regard, and affection of all his pupils. For myself I can say that he made those days among the happiest of my schoolboy life. I cannot remember ever to have seen him angry towards us, and there were not a few of our number well calculated to arouse the temper. He visited at my father's, as he did generally among the families of his boys; and his modesty, his gentle manners, his gentlemanly deportment, and his accomplishments (for he was a remarkably sweet singer and performer on several instruments) insured him a ready welcome wherever he went."

Mr. Lawrence remained in the Land Office until 1845, when he was removed by Mr. Polk's administration, for no other than political reasons. His loss of this place was his gain. He had all along been preparing himself for admission to the bar, and at his entrance of the profession, soon after he left the Land Office, he was not only a well read lawyer, but the knowledge which he had gained in the bureau of the land system of the United States, had qualified him in an eminent degree for practice in that department of litigation which grows out of the administration of the land laws, and which involves not only great amounts of property, but often questions of a very difficult and intricate nature. His forensic talents were more than respectable. He was a persuasive, clear, and accurate speaker; his logical powers were excellent, and had been subjected to a thorough training; and although he never rose to the character of a forensic orator, his performances at the bar, in whatever description of causes he engaged, always left the argument of his side thoroughly considered and lucidly presented, and always ensured to it the careful and instructed attention of the tribunal. With such qualifications, and with manners of singular gentleness, and a very pleasing address, manly, sincere, upright, and courteous, — it is not surprising that he should have succeeded. From the first, he had and continued to have a large practice in the courts of the District of Columbia, and in the supreme court of the United States.

This account of him, however, would be quite imperfect, if it omitted his religious character. He was a member of the Episcopal Church, and his whole "life and conversation" were always under the influence of Christian principle. What he was, indeed, in all the relations of life, can be far better described by an extract from the funeral dis-

course pronounced by his clergyman, the Rev. G. D. Cummins, D. D., Rector of Trinity Church, Washington. We have obtained the passage for the purpose of giving it a permanent place in our journal, and we can say, after the elapse of some months, and with some personal knowledge of the estimate in which Mr. Lawrence was held by all classes of his fellow citizens, that its language was not too warm, or it praise too highly colored.

"What are words at an hour like this? What is human eloquence the most thrilling in the presence of a grief so deep as this, in the shadow of such a sorrow? I have no language fitted to such an occasion, and when I look at that vacant pew and think of the heavy loss this church has sustained, in the removal of one of its brightest ornaments and pillars; when I remember yonder desolate home, and reflect upon the dark cloud that now hovers over it; I feel that silence better becomes this hour than speech, and that we might more fittingly drop our warm tears upon our brother in silence, than listen to any words of eulogy.

But I have a duty to discharge, and the heart's deepest emotion must be subdued until it is discharged, and never have I spoken on an occasion like this, with less fear of exceeding the limits of soberness in anything that I may say of the departed. I have no veil to drop to-day over glaring faults; I have no cloak of charity wherewith to hide great defects of character. I do not present him as a model of perfection, for there is but one perfect being, and our departed brother would have been the first to disclaim freedom from human infirmities.

Let me speak of him first as a man — and what a man! Brave, genial, and true hearted, warm in his sympathies and affections, amiable and courteous, gentle and forbearing, he has passed through this community, winning for himself the good will, the esteem, the love of all who knew him. He has passed to his grave without an enemy, and a whole community has risen up to do him honor. What means this large assembly, this gathering of the most eminent men among us? What means this deep grief that sits visible upon every countenance? It is a testimonial to goodness. It is a tribute to his worth as a man, as a friend, as a citizen.

Shall I speak of him as a professional man, as an advocate, a counsellor? Other tongues than mine, and far better fitted for the task, have discharged this duty. They have borne glad testimony to his noble position in his high profession.

But I cannot forbear to adduce the witness of one, himself occupying a prominent place among us. 'I never knew him by word or even look, amidst any of the ordinary exciting scenes of the profession, to give offence or annoyance to a brother lawyer. He was especially fitted to shine in the highest walks of the profession, he wanted the very defect of character which would have qualified him for the lower.' This is indeed a wonderful testimony, and many of you can bear witness to its truth.

But I have to speak of him in a higher aspect still. He was a true man, he was eminent in his profession, — but he was more, he was a Christian. He held firmly and consistently to his belief in the great truths of the Christian religion. His faith in the Bible was no mere traditionary belief; it was a reasonable faith, built upon an impregnable basis. He had examined for himself the evidence of the divinity of the word of God, and no argument of the sceptic could shake his steadfast mind. I have in my possession, his reply to Hume's famous argument against the credibility of the miracles of our Lord, an argument pronounced by

some of the profoundest minds of this country to be the most satisfactory ever brought forward upon the subject.

But his faith was not only a historical or intellectual belief in Christianity. It pervaded his whole being. He was a Christian in heart and in life, everywhere and at all times, in public and in private, in the church and in the world, in the market-place and in that quiet sanctuary of his own refined home. His piety was not obtrusive, but deep, not like the noisy brook, but like the still, placid current of the river. It was a piety that made itself felt by all who knew him, and no man in this community ever doubted if he were a true Christian.

And yet looking at this sorrow on its earthly side alone, it seems most mysterious. It seems a grievous thing to be called away thus, so young, in life's fullest vigor, amidst its most brilliant promises, when his eye was upon the shining table-lands of success which he could have scaled, in the bosom of a home so happy, so lovely. But I think I can see even with our short sighted vision a reason for this providence.

I would speak with reverence; I do not believe in the propriety of attempting to pierce the mystery of God's dealings with his creatures. If this were far more dark, I would say, He is merciful, wise, loving and good alone. May it not be, however, that our brother has been taken for the good of others—even their everlasting salvation? I cannot doubt it, as he lived not to himself, so he died not to himself, but to the Lord. Who could have been taken from us better fitted to go? Whose death could have taught us such lessons? The vanity of earthly hopes, the beauty of goodness, the value of religion, the sublimity of a life consecrated to God, a life whose highest object was achieved, even the securing of life eternal.

I believe his death will not be in vain, but that many who knew him and loved him will be won to Christ by his example, now hallowed by death, and will say, 'thy people shall be my people, and thy God my God.'

I have been asked if he was aware of his approaching end? And how he met it? I reply he had not to prepare for it at the last hour. His whole life had been a preparation for that hour, and the summons found him at his post, waiting for his Lord. Calmly and peacefully he sunk to rest, not 'like the man who wraps the drapery of his cloak about him and lies down to pleasant dreams,' but like a faithful Christian, who places his hand in that of the King's messenger, and says, 'Lead the way, I am ready to follow.' Oh! this is not death, but the dawn of life eternal.

> 'Heaven lifts its everlasting portals high,
> And bids the pure in heart behold his God.'"

The tract written by Mr. Lawrence in answer to Hume's Argument against Miracles, which is referred to by Dr. Cummins, was, we believe, never published. It was privately printed in Washington in 1845. We shall make no apology for occupying so much of our space as is necessary to lay it before our readers; for, in addition to the interest that attaches to it as a specimen of the logical powers of the writer, and of his interest in the foundations of Christianity, it is in itself a very important and valuable discussion, adding another to the already numerous services which distinguished members of our profession have rendered to the argument, which supports an enlightened and philosophic faith in the revealed religion of the New Testament.

AN EXAMINATION OF HUME'S ARGUMENT ON THE SUBJECT OF MIRACLES.

The celebrated argument of Hume upon the subject of Miracles has long occupied the attention of theologians, and called forth various ingenious and learned arguments in reply; and it may be thought highly presumptuous in an unknown individual to thrust himself into a controversy which has been maintained by Paley, Campbell, Douglass, and others distinguished for intellect and learning; and still more presumptuous to dissent from those writers upon some of the grounds they have taken. Yet, if the positions here assumed shall be found to be correct, they will not lose their interest from the obscurity of their origin; and, on the other hand, if they shall prove to be erroneous, they will do the less injury from not being ushered before the world under the influence of a great name.

Although in all the replies to Hume's essay which we have seen there is much sound philosophy, as well as praiseworthy zeal, yet many of the writers have examined the question from one position only; whilst others, who have set themselves in array against his whole doctrine, have, as we think, misconceived his argument, and consequently have fallen short of the anticipated effects of their own reasoning, from the fact of its being an answer to the supposed, rather than to the full and real meaning of Hume.

We shall not refer to what we take to be misconceptions of this sort from any captious spirit, far less from any purpose of injuring, were it possible, the just effects of what is really excellent and sound in the writings referred to; but because we have thought that an unfair answer in the cause of truth ought not to be sheltered from scrutiny by the advocates of truth, and because we have always felt that Hume had not been fully met in some of his positions, and there was always a secret conviction that what we wished to be true, and believed to be true, had not been fully made out; and a further secret conviction that a good and sufficient answer could be given, in the widest scope his argument could take.

With these remarks we shall proceed to state briefly the argument of Hume, and some of the answers which have been made, at the same time pointing out wherein we consider them defective, and then to examine the argument, and, as we hope, expose its unsoundness.

The following has been well stated to be the substance of Mr. Hume's reasoning:

"A miracle is a violation of the laws of nature. But we learn from experience that the laws of nature are never violated. Our only accounts of miracles depend upon testimony, and our belief in testimony itself depends upon experience. But experience shows that testimony is sometimes true and sometimes false; therefore, we have only a variable experience in favor of testimony. But we have an uniform experience in favor of the uninterrupted course of nature. Therefore, as on the side of miracles there is but a variable experience, and on the side of no miracles a uniform experience, it is clear that the lower degree of evidence must yield to the higher degree, and therefore no testimony can prove a miracle to be true."

In answer to this, reliance has been placed upon the following arguments, among others. Douglass, in his "Errors concerning Religion," after stating Hume's conclusion to be, that miracles can never be proved, because they are contrary to experience, says: "There is sophistry in the use of the word 'contrary,' inasmuch as a fact stated to have happened would not be contrary to one's experience, unless that person was actually present at the time and place, and experienced the contrary of what is asserted." "Miracles, philosophically speaking, are not violations of the laws of nature."

Mr. Starkie, in his practical treatise on the law of evidence holds the

following language: "But the question is, whether mere previous inexperience of an event testified to is directly opposed to human testimony, so that the mere inexperience as strongly proves the thingis not, as previous experience of the credibility of human testimony proves that it is. Now a miracle, or violation of the laws of nature, can mean nothing more than an event or effect which has never been observed before; and, on the other hand, an event or effect in nature never observed before is a violation of the laws of nature: thus, to take Mr. Hume's own example, 'it is a miracle that a dead man should come to life, because that has never been observed in any age or country;' precisely in the same sense the production of a new metal from potash, by means of a powerful and newly discovered agent in nature, and the first observed descent of meteoric stones, were violations of the laws of nature; they were events which had never before been observed, and to the production of which the known laws of nature are inadequate. But none of these events can, with the least propriety, be said to be against or contrary to the laws of nature, in any other sense than that they have never been before observed; and that the laws of nature, as far as they were previously known, were inadequate to their production. The proposition, then, of Mr. Hume ought to have been stated thus: Human testimony is founded on experience, and therefore is inadequate to prove that of which there has been no previous experience," &c.

Others have reasoned in this manner, viz: "That Hume's argument proves too much, as it would be just as strong against many things which we know to have happened as it is against miracles. Any extraordinary event is improbable from experience until it has actually been experienced. Thus it was improbable beforehand that such men as Cæsar and Napoleon should ever live," &c.

Now all this is founded on a misapprehension, either of the reasoning of Mr. Hume, or else of the legitimate consequences of the principles which he assumes. And, first, as to there being an inherent sophism in the use of the word "contrary" to experience. We think that an event which has never been observed before may, in some cases, be properly said to be contrary to experience even by those who were not present at the time or place at which that event is alleged to have happened. Our experience of the relation of cause and effect is a positive experience—an universal experience. And whether our belief in the necessity of a cause for the production of every effect be the result of this universal experience of such relation, or whether it be a simple intuition, an instinctive conclusion, it matters not; the fact is undeniably true that we feel just as sure that every effect that we witness had its cause, and its proper and adequate cause too, as that we witness the effect itself. It is a matter of positive and universal experience also, that like causes produce like effects, and the same cause the same effects. If, then, it is asserted in general terms that an effect has taken place without any cause, or by an adequate cause, or that dissimilar effects have been produced by like causes, or opposite effects by the same cause, we properly reply that it is contrary to experience. Or if a particular fact is alleged which militates in any way against the relation of cause and effect, or the relation of any well known principle in nature and its hitherto invariable results, we say properly that is contrary to experience; not to our experience in person of the contrary of what is asserted, but contrary to universal experience of the results of uniform principles, and of the truth of a fundamental axiom in all philosophy.

It is perfectly true, as Mr. Starkie says, that "our inexperience of an event ought not to weigh against positive "testimony," when that event is a probable one, or even a possible one, under the ordinary laws of nature. But we do not think that this doctrine can extend to events which are not

explicable according to our previous experience of the laws of nature. In the latter case our disbelief is not based upon our not having experienced the particular fact at the particular time alleged; we do not discredit it simply because we did not see it, but our disbelief is grounded upon our positive experience of different results in similar circumstances under the ordinary laws of nature. If a man tells me that he can extract a metal from potash by some powerful chemical agency, I may well believe him, although I may never have seen the thing done, and for this reason — I know that most substances are compounds, I know the power of chemical agents in decomposing these substances, and all this in perfect consistency with the laws of nature. An effect is produced by an adequate cause. The thing itself then being possible, nay highly probable, I may well believe the simple fact of an individual's ability to do it upon his own assertion. But if the same man tells me that by his mere volition he can draw out a metal from potash, I certainly would not, under ordinary circumstances, believe him. And why? Because experience teaches us that no effect takes place without an adequate cause. We intuitively refuse our assent to testimony respecting events which are said to have taken place without the intervention of some cause sufficient to produce them. In extracting a metal from potash there is only a new effect brought to light by a known and competent cause; and although the precise fact had not been within our experience, yet it was not in its nature inconsistent with the experienced power of chemical agency. But in the other case there is an event asserted to have taken place without an adequate cause, without any physical agency—an effect which is both new and not the result of any known laws. Such an event is contrary to our experience of the laws of cause and effect in the general, and of the power of human volition in particular.

Enough we think has been said to show that what Mr. Hume really meant by "being contrary to experience" was, not that the very identical fact had never been before experienced, and therefore could never be believed, but that such fact was inconsistent with the known operation of principles which had been deduced from a long course of observation and experience. We have been thus careful in giving what we believe to be his true meaning, because we wish to approach the subject with perfect fairness, and because we believe that an argument founded upon a false or uncandid statement of his reasoning not only fails to convince us of its fallacy, but reacts on the cause it was intended to support, and in the end does much harm. And besides, we believe that his argument may be successfully combatted, at least to the minds of all who believe in the existence of a "Great First Cause." And it is only to such then we address ourselves, for both Hume and the chief of his followers admit the existence of such a being.

Hume does not deny the possibility of miracles. His argument is not a metaphysical one, founded on the nature or essence of the thing considered, but is entirely a practical one, touching only the reasonableness of our belief in miracles. He no where attempts to prove that miracles cannot be, but that upon principles of reason we cannot believe them to be. Nor would it comport with his philosophical opinions to assert that miraculous events, or any events, could not occur, inasmuch, as he referred all our knowledge to experience; consequently, he could only infer from the past what would probably, not what would certainly, take place in the future. The most that Mr. Hume could say, respecting the possibility of miracles, would be, that as they never had happened, so they never could reasonably be expected to happen.

It is the want of a proper observance of this distinction between that which may reasonably be expected to be, and that which must of necessity

be, which has led to considerable irrelevant reasoning in answer to a misconceived notion of Mr. Hume's meaning. His argument (as we have said) we understand to be entirely a practical one, touching only the reasonableness of our belief in miracles. It does not consist of, nor is it dependent on, the peculiar philosophical notions of its author, as developed in other works. If it did, we should have but little fear of it in its practical effects; for however plausible and ingenious as speculations, the ideal theories of Berkeley and Hume, and the destruction of all connections between cause and effect, so strenuously maintained by the latter, when applied to our every-day affairs, and our temporal or eternal interests, they can have but little influence. We do not much fear the theories of those who, to sustain themselves, must deprive us of those instinctive impressions, and those spontaneous operations of the mind, and those self-evident axioms, which are the foundation not only of all reasoning, but of all action.

But the great error in most of the reasoning in relation to miracles — both in that of Hume and of those who have replied to him — is, in overlooking the true nature of miracles, and attempting to reason on them in the same manner as on ordinary circumstances. They have been treated as facts which must have taken place through the agency of, or in accordance with, the laws of nature; or, in other words, the argument seems to suppose nature to be the cause of their happening. And it is this erroneous view of miracles that Mr. Hume's reasoning overthrows, and none other. But it should be remembered, that miracles are opposed to the ordinary laws of nature, because if they were explicable upon any known laws, they would cease to be miracles. And to speak of the raising of the dead, the turning of water into wine, &c., as of the same kind of improbabilities as the exploits of Cæsar or Napoleon, is certainly a loose mode of reasoning.

But, as we have said, Mr. Hume argues that a miracle cannot be proved, because it is against those laws which experience has shown to be immutable — which means that an event cannot be proved to have happened by the operations of nature, which is against all our experience of the operations of nature. Or, in other words, he does not take into view any other agent (as causing an event) than nature, or any other "*modus operandi*" than the ordinary course of nature. But if we suppose an independent and higher power brought into exercise, which can even set aside the laws of nature, then all such reasoning falls to the ground, because we cannot circumscribe within any laws either the acts, or the manner of acting, of a being who is superior to, and independent of, all laws. For instance, if we were told that a rock had separated itself from the earth, and by the force of gravitation had raised itself in the air, we should disbelieve it, because it is against our uniform experience of the effects of gravitation, which draws heavy bodies to the earth. But if we had been told that the rock had been hurled into the air, by some extraordinary force, which for the time had counteracted the power of gravitation, we might readily believe it. And in this latter case we should not think of reasoning about the uniformity of the law of gravitation, and our want of any experience of a violation of the order of nature, &c., but we should at once perceive that a force had acted independently of the law, and had done something which the law itself would never have done. Just so with miracles. When we are told by Mr. Hume that we ought not to believe them because they are contrary to the laws of nature, we are told truly, if it is meant that they are caused simply by the operations of nature, but we are not told truly if they are considered as the acts of a power superior to the laws of nature, and entirely independent of them.

In this view of the case, let us examine a little more particularly the argument of Mr. Hume. He says, a miracle is a violation of the laws of

nature; but we learn from experience that the laws of nature are never violated, &c. Upon the truth of this proposition the whole of his argument depends, and the conclusion derived from it depends entirely on the truth of each part of the proposition. He asserts experience to prove that the laws of nature are never violated, and that experience proves human testimony to be often fallacious; so that we have an uniform experience opposed to a variable experience, and of course the latter should always give way to the former. The truth of this argument then, and the soundness of its conclusion, depend upon the fact that the laws of nature are never violated. If this proposition be not true, the conclusion is good for nothing. We assert then without fear of contradiction, and as a fact established by experience, that the laws of nature are often violated; nay more, that they are daily and hourly violated in the same manner, though not to the same extent, as they are violated in the case of miracles. When a stone is thrown into the air, the law of gravitation is violated. When a bird takes wing, the law of gravitation is violated. When two bodies in certain states of electricity, are brought near each other, they mutually repel, and the law of attraction is violated. And so in thousands of instances. Nor will it suffice to say, that these are not violations of the laws of nature because they are of frequent occurrence, and may be explained in a natural way; that the law does not cease, but is only overcome for a time. The law is violated for the time as much as a law can be violated. A different effect is produced, from what the law would produce. And it matters not whether the law is overcome by another law, or by an extraneous force, the result is the same, and the law is violated. The "*vis inertiæ*" may be called a law of matter; that is, it is a law of matter that it shall remain at rest unless put in motion by some superior force. A superior force may overcome that law. Now we would ask, wherein does this differ in principle from raising the dead. It is a law of our nature that when we are dead we remain at rest, have no power of motion, nothing of sensation, or of life. Yet may not this law be overcome by sovereign power, in the same way that the "*vis inertiæ*" of matter is overcome by human force? If the question were, whether the dead were ever raised into life by the ordinary operations of the laws of nature, uniform experience of the operation of those laws would lead us to a denial of the fact. But such an inference is not contended for. What we contend for is this, that it is unphilosophical and wrong to adduce the acknowledged uniformity of the operations of nature, when uncontrolled, in opposition to positive testimony in favor of different results where nature is not uncontrolled. We know that effects are every day produced, different from what would have been produced, by the uninterrupted course of nature.

We do not pretend that the laws of nature produce miracles, but that an Almighty power suspends, overcomes those laws, and introduces other effects which are in no other sense miracles, than that they are not caused by the ordinary active powers of nature, but by an extraordinary and unusual exertion of omnipotent power. Nor let it be said that in this reasoning we are giving an improper meaning to the word "violated." We defy the most zealous advocate of Hume's infallibility, to point out any difference (except in the degree of power required, and the time of its continuance) between a violation of a law by that power, which produces a miracle in the sense of Mr. Hume, and that power which causes a stone to ascend. What we call a miracle is no more in the hands of the Almighty, than the smallest exertion of power in the hands of man. There is no difference in principle between the act of the Almighty in exerting omnipotent power, and suspending or overcoming the laws of nature, and the act of a human being in overcoming them for a time by an exertion of limited

power; save that the former exerts his control over laws which he himself has ordained, whilst the other opposes his feeble arm against laws which he cannot long resist. The one can act upon the law itself, and suspend both the law and its effects; the other can only for a moment suspend its effects.

There is another of Mr. Hume's propositions essential to the establishment of his doctrine, which we also think incorrect, viz: "That our belief in human testimony depends upon experience." He treats human testimony as a whole, in the aggregate, without reference to its parts or qualifications. He says, "our experience is against the infallibility of testimony," meaning testimony as a whole. Now we say that experience is not against all testimony, because our experience is in favor of much, perhaps most testimony. All that can be said is, that human testimony is not always found to be true. Hume would have the exceptionable vitiate the unexceptionable. Taking the character of all testimony from the character of one class or species and stamping testimony as a whole as therefore doubtful, he concludes that all the testimony in the world would not be sufficient to establish the truth of a miracle. Now we would observe, that testimony derives its character mainly from the character of the individuals from whom it comes, and the circumstances under which it is given. Our experience is in favor of the testimony of some men and against that of others. There are some men whom we have never known to tell a lie, and others whom we have scarcely ever known to speak the truth. We almost instinctively trust the one and distrust the other. But to bring into one mass all human testimony and brand it as unreliable, because a part is uniformly bad, and only a part uniformly good, is very much like saying that this world is in physical darkness because it is not uniformly clothed in light.

Our senses sometimes deceives us; and the reasoning of Mr. Hume is just as strong, therefore, against the evidence of our senses as against human testimony, both taken as a whole; yet, there are some circumstances in which the evidence of our senses must be considered as absolutely certain.

But it may be said, admit the truth of all this, admit that experience is in favor of some testimony and against other, still may not those who have never yet deceived us possibly deceive us hereafter? Is there an absolute certainty that those who have never yet deceived us, never will deceive us? If a man of unimpeached veracity should tell you that he had lately seen a brook, which had from time immemorial run down a hill, without any known or perceptible cause run up the hill, would you be as certain from that man's testimony that the brook did flow up the hill, as you would be from your experience of the laws of gravitation that it did not flow up the hill? These questions we think present the doctrine in its fairest and strongest light, and we wish to answer them fairly, and at the same time to make known the ground on which we stand. We answer, then, that a man who has never yet deceived us, may nevertheless deceive us. The laws of human conduct are not as open to the view as the laws of physical nature; and in the case of the brook just mentioned, if required to believe the statement without any other circumstance than the bare word of the informant, we should hardly feel convinced of the fact. But our doubts in such case arise from what we suppose the possibility of variance in the one case, and the impossibility of variance in the other. Testimony depends entirely upon the will or choice of the witness, which circumstances may vary. But the laws of nature can only be changed by the will of Him who ordained them, "in whom there is no variableness neither shadow of turning." The presumptions are strongly against any deviation from the

ordinary operations of the laws of nature. Experience would lead us to expect the same results that had hitherto been witnessed to continue, but it could properly go no further. No one would be so bold as to say that the Almighty could not for a time change the laws of his own establishing, or that he might not by possibility see sufficient occasion for so doing. Experience, in this view of the case, is not a proper guide to the truth, for it only makes known what may be fairly anticipated, but not what must of necessity actually happen. But of this hereafter: we wish at present only to say, that evidence itself (as shown by Mr. Starkie) admits of various degrees; it is strengthened by concurrence of testimony; it is still further strengthened by concurrence of circumstances; and it is possible that there should be such a concurrence of testimony and circumstances as to render the falsity of the evidence as improbable, nay, as impossible, as the facts which it asserts, Nay further, there may be circumstances in which the violation of a law of nature shall be a more probable event (even judging by experience in its proper sense) than that the evidence and the circumstances brought to support it, should be untrue. For example, if on the 8th March I started for New York to take passage for Europe, and just before leaving W., a man whom I had never known to deviate from the truth, told me that at 12 o'clock in the night previous, in the midst of total darkness, the sun appeared in meridian brightness at the zenith for one hour, and had then suddenly disappeared, I should probably think that he had seen a meteor, or had been dreaming. or that he wished to frighten me, or that he was telling a lie; but I should hardly believe that the sun had been seen by him at the time and in the manner described. If the man seemed terrified, I should suppose that at least he believed what he was telling, but I should still attribute it to delusion. But if I heard others talking of the same event, and saying that they had seen it, I could not doubt that some remarkable luminary had thus appeared, but could not believe it to be the sun. If on arriving at New York, the same thing were talked of and believed, all agreeing that it was the sun, that the light and heat were those of the sun, I should be still more staggered. I set sail immediately for Europe, and ours is the first vessel that arrives after the 8th March from the United States. On our arrival, the first topic of inquiry is, whether the sun was seen at midnight on the American side of the Atlantic. Persons assert on all hands that at the precise hour it was seen in Europe. On looking at the newspapers of the 9th., I find full accounts of the phenomenon, and all agreeing that the object seen was the sun. Now I ask, could I doubt this concurrence of evidence? If so, on what principle could I doubt it? Mr. Hume tells us that it is against our experience of the uniformity of the laws of nature. But is it not equally against our experience to find such evidence as this false? But Mr. Hume would say, though the witnesses may not be false, it is still probable that they were deceived. To this we reply, that they could not be deceived as to the reality of some remarkable phenomenon, but only as to the fact of its being actually the sun. Well now suppose, further, the evidences of the truth of the New Testament to be just as they now are, and suppose there were contained therein certain prophecies that the Messiah should again appear on earth about this time; that there should be certain signs and wonders in the heavens and on the earth, just preceding his appearance, among which prophecies should be contained one, that the sun should appear at midnight and shine with its usual splendor, and that other of the predicted signs and wonders had absolutely taken place, would not this place the evidence that we have before spoken of in a state of absolute unassailability?

We believe, then, that those extraordinary acts called miracles are, in themselves, when considered with reference to the established laws of na-

ture, in the highest degree improbable, though upon the supposition of an independent and superior power, perfectly possible. We say in themselves improbable, because we could in no way suppose a miracle possible without the intervention of such controlling force. They contain within themselves no explication of their causes, in unison with the uninterrupted operations of nature, but are referable only to arbitrary, absolute, and unaccustomed power.

If then we were once to suppose an Almighty Sovereign and moral Governor of the universe, whose character and attributes were somewhat shadowed forth in the works of nature, but who was about to give a revelation for the proper conduct and final salvation of men, it would then become probable, or at least not incredible, that he would give evidence of the genuineness of this revelation, and of the source whence it emanated, by the performance of acts which should in themselves be extraordinary and improbable. That he would prove the revelation as coming from the omnipotent God, by the exhibition of omnipotent acts; because, in the same proportion as the acts were improbable or supernatural, so would the probability be of their divine origin; and in the same proportion as their improbability should be diminished, would the probability of their being in the usual course of things be increased. Circumstances then may render it probable that the Almighty would arbitrarily perform acts, which in themselves would not only not be probable, but violently improbable under the known course of nature. Whenever an occasion for miraculous power shall be seen, then we may reasonably expect a manifestation of that power; and we see no reason why the expectation thus raised, may not counterpoise the expectation induced by experience, that the manifestations in the natural world shall be as they have hitherto been. It is but an inference, not a certainty, in either case Thus, that water should by the force of gravitation rise above the level of its fountain is in itself an event as improbable as well could be. And yet, if the Almighty were to send an accredited messenger from Heaven, it is very probable that he would enable him to perform acts as unusual and unaccountable as that of raising water above its level by a word, for such acts would be the vouchers of his mission. Under such circumstances, miracles would be the very best, if not the only satisfactory evidence; and inasmuch as from their natural improbability, (judging by the ordinary course of events,) they would be the best evidence of supernatural power, so they would be the most probable means that we can conceive of by which a divine revelation would be accompanied. The question would then become entirely a question of fact. The probability arising out of the occasion, the circumstances, the demand for them, would neutralize the improbability growing out of the nature of the miracles themselves; and as to their susceptibility of proof they would be on the same footing with other remarkable facts.

We have thus endeavored to set forth the true and legitimate meaning and effect of Mr. Hume's argument, by pointing out some of the particulars in which he may have been misunderstood; to show that his argument in its utmost force can apply only to those events which are, or are alleged to be, natural or from natural causes; to show that our experience of the course of nature under prescribed laws cannot reasonably be set against the acts or manifestations of a Being who is superior to all laws; to show that the inference of Mr. Hume is not legitimate, because one of the essential propositions on which it stands is not true, viz: that the laws of nature are never violated; and lastly, to show that there may exist even a probability that a Being who is independent of all laws should act in direct opposition to the laws of nature, whenever he should wish to manifest himself to mankind, or to accredit any created being as a messenger from himself.

Superior Court of the County of Suffolk. November Term, 1856.

BEFORE THE FULL BENCH.

(*Reported by* L. H. Boutell, Esq.)

Hammond *v.* American Mutual Life Insurance Co.

Where the premium on a policy of life insurance is made payable quarterly, in advance, on or before noon of the first day of each quarter, and the policy is to be void if the premium shall not be so paid, and the first day of a quarter falls on Sunday, the premium is not due and payable until the next day at noon.

Where a person so insured, dies on the afternoon of a Sunday, which was the first day of a quarter, without having paid the premium for the ensuing quarter, the insurers are liable.

This case was argued on an agreed statement of facts. John Hammond, on November 3, 1852, procured of the defendants an insurance on his life for the sum of one thousand dollars, payable at his decease to his wife, the plaintiff. The policy provided among other things, that the premium should be paid quarterly in advance, and "on or before the day, at noon, on which the same shall become due." The insured paid the premiums to October 1, 1854, which day fell on Sunday. He died on the afternoon of that day, not having paid the premium for the quarter ending January 1, 1855. The plaintiff tendered the defendants the amount of such premium before the noon of October 2, 1854, which the defendants refused. And upon their refusing to pay the amount of the policy this suit was brought.

H. A. Scudder, for defendants, presented the following among other points: —

This contract does not come within the rule that "when the day of performance of contracts falls on Sunday, compliance with the stipulations of the contract on the next day is deemed in law a performance." This rule is one of necessity, justified only by necessity, and to be applied only where necessity requires.

In ordinary contracts, to be performed on a day certain, performance thereof cannot be compelled or tendered before the day arrives; and if not on the day mentioned, then performance must be enforced or tendered on the succeeding day or never. But in this case, the performance was

to be on or before the day named, and might therefore have been tendered before as well as on that day; and thus, so far as the plaintiff is concerned, the necessity never existed, and the rule or indulgence based on it cannot be claimed.

Again the rule contended for is a rule of equity and expediency, such as will work no harm, or the least possible harm to the parties. In ordinary cases no harm is produced by the operation of this rule. But to apply it to this case, would enable the assured, by his own negligence, to cast upon the defendants the risk of insuring his life for an additional period, without any adequate consideration therefor; it being entirely optional with the assured to pay or not on the day succeeding.

Another objection to the application of the rule to this case is, the compliance with the terms of the policy to pay the quarterly premiums being entirely optional on the part of the assured, there was no contract or agreement to comply; and consequently there was nothing to which the rule could be applied.

The act to be performed on the part of the assured was in the nature of a condition precedent, and as such should be literally construed.

L. Mason, for plaintiff.

The opinion of the court was delivered by

Huntngton, J. — The question arises upon the true construction to be given to a contract of insurance, contained in a life-policy, issued by the defendant company.

There are various stipulations, but the material ones, so far as relates to the question raised in this case, are those touching the payment of the premium quarterly in advance.

The policy purports to be made partly in consideration of the representations and statements of the assured, and partly in consideration of the payment of the premium quarter-yearly in advance. It is payable within ninety days after proof of the death of the assured, provided the policy is then in force.

There is a provision in the policy that it shall terminate and become null and void, among other things, not material to this question, "in case the premium charged hereon shall not be paid . . . . quarter yearly in advance, on or before the day at noon, on which the same shall become due and payable." The quarterly payments had been made for the quarters prior to October 1st, 1854, on which

day, it being Sunday, at 4 o'clock, P. M., Hammond, the assured, died, not having paid the premium for the ensuing quarter, ending January 1st, 1855, in advance.

It appears from the policy that it had once attached. It was to terminate upon certain conditions. The use of the word "terminate" implies that it had begun to run, which indeed is not denied. The condition as to the quarterly payment, though in advance, was in the nature of a condition subsequent. Whether the policy was "in force," therefore, at the time of the death of Hammond, depends on the question, whether the quarter-yearly payment in advance had or had not become due and payable on the first day of October, 1854, it being Sunday. If it was not then due and payable, the policy was by its terms in force, for it was a policy for life and not for a term of years, and it is not claimed that any other condition has been broken. If it was due and payable on that day, no tender on a subsequent day could avail. Neither can the acceptance of quarterly payments by the defendants, after they were due at previous periods, as the case finds, be used as evidence of a waiver, because it was done under a right reserved by the company under the contract. We find no decision that meets the question here presented. Neither is it within the provisions of the act of 1856, touching the performance of certain contracts on Sunday, if in terms that statute should be construed to apply to a contract of this character. The nearest approach to the case at bar we have been able to find is that of *Sands* v. *Lyons*, 18 Conn. 18, where a testator devised property to his son B., on condition that he should pay to A. $ 100.00 within one year after the testator's decease. He died October 2d, 1841. October 2d, 1842, which was the last day of the year in which it was to be paid, came on Sunday. It was held that a tender on the succeeding Monday was sufficient. The court, in their decision, recognized the doctrine laid down by a majority of the court in *Avery* v. *Stewart*, 2 Conn. 69, as tersely stated by Judge Gould, that "Sunday cannot be regarded as a day in law for the purpose of performing contracts; it is to be considered as stricken from the calendar."

The principle laid down by Judge Gould is recognized in *Salter* v. *Burt*, 20 Wend. 205. Our own court, in *Stebbins* v. *Leowolf*, 3 Cush. 173, without declaring what the law is in Massachusetts, and alluding to the diversity of

decisions, apply the law as established in New York and Connecticut, to a contract governed by the laws of New York without dissent or question.

It is argued, however, that these were cases where the contract could not have been performed before the day named, but that in the case at bar it was stipulated that the premium should be paid on or before the day it became due. In *Sands* v. *Lyons*, however, where the legacy was to be paid within a year, though the Court declined deciding the point, it would probably be *held*, that the legacy might have been tendered before the last day.

If we adopt the construction of the defendant, and hold that inasmuch as the premium might have been paid before October 1st, Sunday is not to be considered as stricken from the calendar, we assume to alter the provisions of the contract, and to strike out the option secured to the assured, of paying in advance either on or before the day it beame due. The rule in *Salter* v. *Burt* was applied to all contracts falling due on Sunday, "other than instruments on which days of grace are allowed." There is no grace in a contract requiring a man to advance or pay money before the last day fixed by the contract. Contracts of insurance are to be construed liberally in favor of the assured, and not captiously and literally. If we hold that this payment should have been made on Saturday, we deprive the assured of one day which he would have had, if the first of October had not fallen on Sunday.

If we hold that it might be made on Monday, we deprive the company of money which they would otherwise have received a day earlier.

We read the contract as securing to the assured the right to pay in advance until the last hour of the last day of the preceding quarter at noon. At that hour the law made the payment illegal. We think, therefore, that the law gives as much time on the succeeding day, as it takes away on that last day.

The death on the afternoon of Sunday consequently was before the condition was broken, and the insurance having previously attached, and continuing for life until this provision was violated, we must consider the policy as in force at the time of the death.

Conditions annexed to estates in realty, so as to go to their defeasance and destruction, are taken strictly and not beyond their words. By analogy, the same rule may well

be applied to any condition subsequent, where a valuable right, interest, or property was once vested.

We are referred to *Tarelton* v. *Stamforth*, 5 T. R. 695; *Want* v. *Blunt*, 12 East, 183, and *Ruse* v. *Mutual B. L. Ins. Co.* 8 Georgia, 534, as sanctioning a contrary doctrine. In all these cases, however, the premium was not offered or tendered until after it was due by the terms of the policy as construed by the court, and the last day did not fall on Sunday, but on a day when it might legally have been paid. The ingenious argument for the defence proceeds upon the assumption that the payment was due, and we should feel bound by the force of its reasoning, if we thought the true construction of the contract to be that the advance premium became due on Sunday, October 1st. In *Want* v. *Blunt*, the court say the policy in terms was declared to expire on quarter day, and the premium was to be paid during the life of the assured, personally by him.

In *Tarelton* v. *Stamforth*, the insurance was only for six months in terms, and the death occurring subsequently, and there being no insurance till the premium was actually paid, the court held in both cases that the policy was not in force. The case in Georgia was precisely similar. It will be seen that the contracts of insurance in those cases were dissimilar in their provisions to the case at bar, and the law of those cases does not govern the construction of a policy different in terms.

We construe the contract submitted to us, as if there were an express stipulation inserted, providing that when the last day of the quarter falls on Sunday, the advance premium shall not be considered as due till the succeeding Monday at noon. A day, other than Sunday, October 1st, must be substituted, either the Saturday before or the Monday after, and for the reasons assigned we adopt the latter day, and hold the policy in force at the time of the death, and judgment must be for the plaintiff.

Notes of Recent Cases in New Hampshire.

Supreme Judicial Court.

Hillsborough. Adjourned Term, March, 1857.

Spear *v.* Richardson.

Opinions of witnesses.

The opinions of witnesses cannot ordinarily be received as evidence, unless they relate to matters of skill and science.

What constitutes unsoundness in a horse is a technical question; and so whether a horse has a particular disease; and a witness, not an expert, cannot testify that a horse was or was not sound, or that he had or had not the heaves. Whether a horse appeared well and free from disease in a general sense, is matter of common experience; and a witness, not an expert, may testify to that extent.

Bow *v.* Allenstown.

Secondary proof of incorporation — Reputation — Prescription — Implied grant.

Where no charter or act of incorporation can be found, the incorporation of a place as a town may be proved by reputation; by long uses of town privileges, or by legislative grants necessarily implying a town corporation.

An act of incorporation afterwards passed, does not raise any conclusive presumption that the town was not before incorporated. It is evidence to be weighed by a jury.

Deeds and other private documents are admissible as evidence of reputation of the matters of general and public interest recited in them, but such deeds and the declarations of persons deceased are not so admissible, unless it appears that the parties were conversant with the place.

A verdict and judgment against a town in an action for the support of a pauper, though after the act of incorporation, is evidence in the same view, if founded on a settlement of an earlier date; and its effect will not be modified by evidence that the same pauper was afterwards supported by the other party to the suit.

A private act reciting the burning of the secretary's office, and an account of the same fire communicated to the New Hampshire Historical Society's Collections by a former secretary of State, are competent evidence of the historical fact, when suggested to account for the circumstance that no record of any charter can be found.

Evidence of a search without success in the secretary's office for some record of a charter, and that no records of charters of

this and several other towns can be found, is admissible, and is a sufficient foundation for the admission of secondary evidence.

The records of the place in question are admissible to show the character in which they assumed to act, whether they show acts, which a town only can do, or such as places unincorporated may also do. For places required to raise part of the State taxes, though called unincorporated places, have long enjoyed many of the corporate powers of towns; but they had no such powers in relation to highways, nor paupers, nor in some other cases.

Books of account of the selectmen are admissible in the same view, and whether the acts there entered were done in a legal manner or not, is not material; nor is it material that they are not certified by the town clerk.

Venires for jurors issued to a place as a town, and the return of jurors by the town officers, are competent evidence of reputation, and the latter of acting as a town, for towns only were authorized to draw jurors.

Acts of the legislature incidentally recognizing a place as a town, are admissible as evidence of reputation, and also as evidence of the assent of the legislature to the exercise of the powers of a town.

The exercise of the corporate powers of a town, under a claim of right, for the period of twenty years, without objection, and with the knowledge and assent of the legislature, furnishes conclusive evidence of a charter which has been lost, or of a prescriptive right as a town.

Under our constitution, a grant by the legislature to a place having less than one hundred and fifty rateable polls to send a representative, by implication makes the place a town.

So the annexation of other territory to the town of A., must by implication make it a town, if not before incorporated as such.

NORRIS *v.* MOULTON, *Adm'r.*

Homestead exemption — Rights of widow.

A widow who continues after the decease of her husband to occupy the dwelling which constituted his family-home at the time of his death, is entitled, under the act of July 4, 1851, to a homestead, to be set off and assigned to her out of his estate to the value of $500; and her right to the homestead is paramount to the claims of creditors, heirs, and devisees, so long as she continues to occupy.

The homestead is to be assigned to the widow notwithstanding the estate is under the incumbrance of a mortgage which is paramount to the homestead right; and in making the appraisal the estate is to be treated as though it were free from the mortgage.

The judge of probate is authorized to make the assignment by Chap. 167 of the Rev. Sts., which declares that he may cause the dower and share of the widow and the shares of any or all of the heirs or devisees in the estate of any person deceased, to be divided and assigned to them in severalty.

SHIRLEY, *Appellant*, *v.* HEALDS, *Appellees.*

Rights of executors to appeal.

Upon the death of a testator and before probate of the will, the person named as executor becomes possessed of all the personal estate of the deceased as trustee for the legatees, creditors, and others under the will, and is the only legal representative of the estate disposed of by it.

The person named as executor has sufficient interest in the estate of a testator to give him the right, under the statute, to claim and prosecute an appeal from a decree of the judge of probate, refusing to admit the will to probate. The interest of such person in the estate of the deceased is sufficiently set forth, by an allegation that he is named as executor of the will and interested therein.

Merrimack. March Adjourned Term, 1857.

PERKINS *v.* LANGMADE.

Formation of school districts from parts of adjoining towns — Taxes in such cases how to be assessed.

Prior to the passage of the act of June 26, 1845, no general law existed for constituting a school district composed of the inhabitants of, or comprising territory within different towns. The petition to the selectmen for a new district under the provisions of § 2 of that act, need not set forth the particular interest which the petitioners have in the subject. It is sufficient if it allege in general terms that they are interested.

It is no legal objection to the validity of the proceedings in constituting such district, that its boundaries, as established, are different from those prayed for; nor that other persons than the petitioners are included within its limits; nor that an entire district existing in one of the towns is taken as part of the new district; nor that a majority of the members of either district were opposed to the measure.

A tax assessed for school-house purposes by the boards of selectmen of the towns in which the new district is situated, acting together as a joint board, is illegal. The assessment in such case is to be made under the provisions of § 3 of that act, which requires the just proportion of the members of the district in each of the towns to be assessed by the selectmen of the respective towns.

CRAFTS *v.* THE UNION MUTUAL FIRE INSURANCE CO.

New trial.

A new trial will not be granted on the ground of newly discovered evidence, unless it be made to appear that injustice has been done by the verdict, and that the newly discovered evidence

is of such controlling character that it will probably correct the injustice upon the new trial; nor unless it goes directly to the merits of the case, and not merely to contradict or impeach a witness; nor if it applies to a point directly drawn in question by the suit or defence, but which was so far abandoned by the losing party at the trial and in the preparation for it, that all inquiry upon that point was waived by him.

A verdict will be set aside on the ground of misconduct of the party, if by his procurement or connivance a person who had knowledge of facts material to contradict one of his witnesses, is hired to keep out of the way so that he may not be summoned by the other party.

Grafton. March Adjourned Term, 1857.

Corbett v. Norcross.

Grantee of land — Attestation of deed — Estoppel — Description in conveyance.

An individual cannot be made the grantee of land without his consent; and a refusal to accept a grant may be shown by parol evidence.

The wife of a grantor is not a competent witness to attest his deed.

The proprietors of common and undivided lands may divide the same among themselves by metes and bounds, and lots and ranges. They may make partition either by vote or deed. Or they may convey their undivided interests without partition.

If a party is present and sees another sell and convey property, whether real or personal, to which he may assert a title, without disclosing his title or objecting to the conveyance, and the sale is made with a full knowledge on his part, he will be estopped by his silence from setting up his title thereafter; and this principle may be carried out at common law without resort to equity. Estoppels are binding upon parties and privies; privies in blood, privies in estate, and privies in law.

The proprietors of a common and undivided tract of land attempted to make partition of the same by lots and ranges, but failed to do it legally. Each of them afterwards made conveyances by lots and ranges according to the partition; but subsequently conveyed the tract to others by giving deeds of their undivided interests.

Held, that those claiming under the deeds conveying the undivided interests, were estopped from denying the partition as against those who held title under the deeds conveying the lots and ranges.

A plan was made of a tract of land of which the corners were given, dividing the tract into ranges and lots, but the lots were not laid off upon the ground. Conveyances were made by ranges and lots according to the plan.

Held, that the corners of the tract being given, the lots could be run out according to the plan, and that the deeds were not void for uncertainty.

Strafford. March Adjourned Term, 1857.

Payson *v.* Payson.

Cause of divorce commencing in another jurisdiction.

Where a husband deserted his wife in Massachusetts, where they had previously resided, and made no provision for her support, and the wife removed to this State, and always afterwards resided here, and such desertion continued for three years, the time required to constitute cause of divorce after her removal here, a divorce was decreed.

And the same rule was held to apply in case of abandonment, and refusal to cohabit.

June Term, 1857. *Merrimack.*

State *v.* Haines.

Indictment — Married woman.

A married woman is liable under the statute for selling spirituous liquor without license, who sells such liquor belonging to her husband in his absence and by general authority from him.

State *v.* Woodbury.

Liability of selectmen under act concerning intoxicating liquor.

Selectmen of towns are liable to indictment for neglecting or refusing to appoint an agent for the sale of spirituous liquor under act of 1855. It is not an excuse for such neglect of the duty imposed by the statute that the town have voted not to provide funds for such agency.

Fuller *v.* Bean.

Trespass — Rule of damages.

In trespass *de bonis asportatis*, where the property was taken and sold by an officer under insufficient process, and was bought in by the owner, the rule of damages is the amount paid at the sale and interest.

State *v.* Shaw.

Indictment under act for suppression of intemperance — Negative averments.

Upon the trial of an indictment for selling intoxicating liquor, under the act of July 14, 1855, it is not incumbent upon the government to prove the negative averment contained in it, that the respondent was not an agent appointed under the provisions of the

act for the purchase and sale of such liquor. The authority of such agent is limited to sales made within the city or town for which he is appointed. It is, therefore, unnecessary that the indictment should negative the fact that he was agent for any other city or town than that in which the sale is alleged to have been made.

It is no ground for a motion in arrest of judgment, that the indictment in such case does not charge the offence to have been committed within the county where the indictment was found, otherwise than by describing the respondent as "of the city of Concord in said county," and averring that the liquor was sold "at said Concord," that being a city within the county.

It is not necessary to negative, in the indictment, the exceptions contained in the act, of sales of domestic wine or cider, of imported liquors, or sales by one agent to another; they not being contained in the enacting clause.

Wadsworth *v.* The Town of Henniker.

Liability of towns to selectmen for money paid on account of assessment of illegal taxes.

A town cannot be made liable to their selectmen upon an implied promise to refund to them the amount of damages recovered by a citizen of the town, against the selectmen, on account of a distress of his property under their warrant to the collector of taxes for the non-payment of a tax assessed by them; the tax being adjudged illegal because it was assessed for money voted by the town, to be raised for a purpose for which they had no authority to raise money by tax.

Money thus paid as damages by the selectmen cannot be recovered as money paid for the town, nor upon the payment of such damages can the money in the town treasury, arising from the illegal tax, be recovered by the selectmen to the extent of the damages paid, as money had and received by the town to their use.

State *v.* Certain Casks of Rum, Kelley, *claimant.*

Costs on seizure of liquor.

In proceedings under the act of July 14, 1855, for obtaining a decree of forfeiture of intoxicating liquor on the ground that it was kept with intent to sell in violation of the act, a party appearing as claimant of the liquor and resisting the decree, is entitled to costs from the county, when it appears affirmatively upon trial that the liquor was not kept by him with such intent; but he is not entitled to costs upon the complaint being quashed.

June Term, 1857. *Hillsborough.*

GOFFSTOWN AND DUNBARTON'S PETITION.

Reports of commissioners on petitions referred to joint boards.

Under the statute providing that all petitions relating to roads, which pass over land in two or more counties, shall be referred to the commissioners of all such counties, "and they shall constitute a joint board." It is not necessary that the reports should be signed by a majority of the commissioners of each county. If signed by a majority of the joint board it is sufficient. The towns of G. and D., situated in different counties, petitioned the court for the discontinuance of a highway laid out in those towns, and it was referred to the road commissioners of both counties, making a joint board of six. A report, discontinuing the road, was signed by four of the six, three of them residing in one county and one in the other.

Held, the report was good.

NORRIS *v.* LITCHFIELD.

Liability of town for insufficiency of highway.

A traveller, riding in the night in his chaise across a bridge, struck his wheel against a wagon coming towards him, and his horse and chaise were thrown off the bridge, in consequence of the want of a suitable and insufficient railing. At the time of the collision, the nigh wheel of the plaintiff's chaise was on the left side of the centre of the travelled part of the highway, but the traveller was driving with all the care the case admitted of, and his wheel was on the wrong side of the road from accident, and not from design or negligence. It was *held*, that, as the jury found that the damage would not have been sustained but for the want of a proper railing, the town was liable.

NASHUA AND LOWELL RAILROAD *v.* STIMSON.

New trial — Costs — Practice.

When it appears that a trial has not been had by reason of accident, mistake, or misfortune, the court will generally grant a new trial without inquiring into the merits of the action, if satisfied that an actual matter of controversy exists, which the party claiming the new trial desires and intends to try, and would have tried, but for the accident, mistake, or misfortune shown.

In petitions for review or new trial, costs will ordinarily follow the event of the suit, as in other cases.

Where an injunction has been issued to prevent the completion of the levy of an execution against a corporation, charged as trustee upon default, the case will be retained, after a new trial has been granted to the trustee, for the purpose of controlling the injunction, and of determining the ultimate question of costs.

MATTHEWS, *Pet'r. v.* FOGG.

Probate appeal — Practice.

An appeal from the decision of a court of probate will be granted, when the same has been lost through accident, mistake, or misfortune, without fault, if it appears that important questions of law were involved therein, which the petitioner intended and was reasonably entitled to litigate before the appellate tribunal.

Generally the merits of the controversy between the parties will not be determined or fully investigated on a petition for such appeal.

June Term, 1857. *Rockingham.*

JONES *v.* PIERCE.

Guaranty — Foreign attachment.

Where one agrees as guarantor, that the principal shall pay a debt within a specified time, and the creditor draws a bill for the amount on the principal debtor, payable within the time limited, to a third party or order, if the payee and holder of the bill neglect to present it to the drawee for payment, the guarantor is discharged from his liability.

If one who is indebted for work and labor is summoned in the process of foreign attachment as trustee of his creditor, in a suit where the real demand against the principal defendant exceeds in amount the debt due to him from the trustee, and the trustee, pending the foreign attachment, agrees in writing with the principal defendant to pay for him towards discharging the debt due to him from the trustee, such of his debts to a limited amount, as he may designate, provided the payment of the debts so designated shall not be inconsistent with the trustee's liability in the foreign attachment, the trustee is not bound to pay any designated debts of the principal, until he is discharged from the trustee process.

WALKER *v.* CHEEVER.

Powers of supreme court as a court of equity.

The supreme judicial court, as a court of equity, has full chancery powers, and will administer relief in all cases falling within equity jurisdiction, where the statutes of the State have not provided other means of redress.

Equity will not be ousted of its jurisdiction, because the courts of law have adopted equitable principles.

A bill in equity cannot be upheld against executors or administrators, merely upon the ground that they held the estate of the deceased in trust; but a special case must be shown, calling for equitable relief.

The complainants, six in number, signed a joint and several note

with four others, for $10,000, and paid the note. Two of the four paid to the complainants their proportion of the note, and one of the remaining two died, leaving the defendants as his executors and residuary legatees. Upon a bill filed against the defendants for contribution, it was *held*, that, notwithstanding the complainants had a remedy at common law, yet the bill might be maintained; the subject-matter being within the original jurisdiction of equity, and a multiplicity of suits being prevented by the bill.

Howard v. Handy.

Foreclosure of mortgage — Notice — Possession by tenant — Rights of assignee.

Where an entry is made by a mortgagee to foreclose his mortgage, under § 14, chap. 131, Rev. Sts., possession may be held by him through the mortgagor as his tenant; and such possession being actual and peaceable, is as good as though held by the mortgagee in person.

Publication of notice of an entry to foreclose in some newspaper printed in the county, according to the provisions of the statute, is a sufficient notice to all interested that the foreclosure has been commenced. The assignee of a mortgage takes by the assignment all benefits to be derived from any entry by the mortgagee to foreclose.

Atlantic Ins. Co. v. Goodall.

Double insurance — Waiver.

A policy provided that the insurance should be void, if there should be any other insurance on the property, without the consent of the directors indorsed on the policy. At the time of the application, the property was insured in another office, and it was understood that the old policy should continue, until the new one was obtained, and should then be surrendered. The new policy took effect January 22, 1849, and the old policy was surrendered to take effect at the same time, but was not in fact discharged in the office till February 1. In an action for assessments on the new policy, it was *held*, that this policy was not void for want of an indorsement, but only voidable; and that it might be confirmed by the company; and that a letter of the secretary, declaring the policy good, after he had been informed of all the facts, was a waiver of the objection, and a confirmation of the policy.

It was *held* also, that the surrender of a policy, to take effect at a fixed date, discharges all claim of the insured from that date, without regard to anything done by the company. The policy is a valid consideration for the premium note, which remains in force, notwithstanding the discharge of the policy, till the discharge is

communicated to the office, and the assessments and any other legal claims are paid.

Though a policy by its terms is to take effect at a certain time, yet it may be shown, that from want of delivery, failure to comply with some condition precedent, or other cause, it did not take effect at all, or not till some subsequent time.

Willey *v.* Portsmouth.

Highway — Reputation — Evidence.

It is no objection to an interrogatory that it assumes a fact, if that fact is not controverted.

Where a witness uses a term, which has a common as well as a technical signification, it will be understood in its common sense, unless the contrary appears. Copies of town records are competent evidence. If words of the original record are worn out or obliterated, a blank should be left, and a note added, stating the fact.

Where ancient records are defective, every presumption will be made in favor of the regularity of the proceedings. Towns in this province, for a long period, claimed and exercised the right of disposing of the common lands within their limits.

The existence of ancient highways as well as their limits may be shown as matter of reputation by recitals in ancient writings. The laying of a new highway to the fence, at the side of an ancient road, is evidence that the fence is a bound of the old highway.

Evidence of a previous failure of a culvert, repaired by the town officers, is evidence of notice of its defective construction. The town will be liable for defects of that part of a road, which has been made by others, apparently equally suitable for public travel, as the part constructed by the town, unless they place some barrier to indicate the limits of the road.

Rollins *v.* Robinson, *Ex'r.*

Appeal from commissioners of insolvency — Trustee process.

Where the trustee in a process of foreign attachment dies pending the suit, and his estate is administered as insolvent, the plaintiff, in virtue of the lien acquired by the trustee process, is entitled to present the claim in favor of the principal defendant, on account of which the trustee is summoned, to the commissioner of insolvency for allowance, and to appeal from the decision of the commissioner disallowing the claim, notwithstanding the principal defendant has presented the claim and taken an appeal. If more than one appeal be entered at the trial term, the several entries will be consolidated upon the docket, and each party appealing will have the right to try the question against the administrator, under the rules of law, and upon the evidence applicable to his particular case.

State v. Rye.

Highways — Jurisdiction — Regularity of proceedings — Nuisance.

The court of common pleas having general jurisdiction on the subject of highways, if the record show upon its face a proper exercise of their jurisdiction, evidence *aliunde* will not be received to oust them thereof in respect to any judgment establishing a highway. The proceedings of that court, in laying out a highway, cannot be called in question collaterally for any want of regularity therein, but the same are valid until reversed or set aside upon *certiorari*.

Selectmen have no authority to lay out a highway, without a petition to them for that purpose, and if they undertake to establish a highway, under the instructions of the town, their proceedings are invalid. If the public have no means of access, and no occasion by and upon which they can use a new highway, it is no nuisance for the town in which it is situate not to build and keep it in repair.

Smith v. Eastern Railroad.

Railroads — Liability for injury to animals — Pleading — Variance — Arrest of judgment.

Railroads are bound by statute to maintain fences on both sides of their track, for the convenience and safety of adjoining landowners.

If an animal come upon the track of a railroad, through the neglect of the corporation in not maintaining a suitable fence against the lands of its owner, and be there killed by the train, the railroad corporation is liable for the damage, although there may have been no negligence in the management of the train. A declaration alleging in substance that the plaintiff's horse, being upon the track of the defendants' railroad, was there negligently and carelessly run over and killed by their train, is sufficient.

Such a declaration is sufficient after verdict, although it may have appeared in evidence that the negligence of the defendants existed in relation to their fences, and not in the management of their train. A variance between the proof and the allegations of the declaration must be taken advantage of at the trial, if a good cause of action be stated or implied in the declaration.

After verdict, judgment will not be arrested, although there be in the pleadings a defect, imperfection or omission, in substance or in form, which would have been fatal on demurrer, if the facts stated in the plea be such as necessarily to imply, and the issue joined be such as necessarily to require on the trial, proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed that the judge would have directed or the jury found the verdict rendered.

Supreme Judicial Court of Massachusetts.

March Term, 1857. *Suffolk County.*

Lodge *v.* Spooner.

Contract — Agreement to pay money in foreign country — Damages.

By a contract made in Boston, the plaintiff agreed to transport the defendant and his family to a port in China, for the sum of $1800, to be paid in China. The plaintiff having performed his part of the agreement, brought this action in Boston, and claimed to recover, besides the original sum and interest, the rate of exchange existing between this country and China, at the time when the money should have been paid.

Held, that the measure of damages was the sum of eighteen hundred dollars and interest, without exchange.

Evidence that there was no tribunal in China in which one foreigner could recover a debt of another foreigner, is immaterial.

Evidence that the plaintiff had ordered his agent to invest these funds in China, is inadmisible. *Adams* v. *Cordis*, 8 Pick. 260, affirmed.

S. Bartlett and *D. Thaxter*, for plaintiff.

E. D. Sohier and *C. A. Welch*, for defendant.

Kimball *v.* Howard Fire Ins. Co.

Fire insurance — Subsequent insurance — Notice.

In the policy sued upon, was contained this printed proviso: "That in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, not notified to this company, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on the policy, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." This insurance was effected April 2, 1851, and, in the same month, other insurance was effected at another office, which was not notified to the defendants until after the loss happened in the November following. The second policy contained a proviso, in print, entirely similar to that above given, but, in writing, was inserted "Other insurances permitted without notice until required."

Held, that this permission extended to prior as well as subsequent insurances, and therefore the second policy was valid, and avoided the one in suit.

B. F. Brooks and *J. D. Ball*, for plaintiff.

H. F. Durant and *B. Dean*, for defendant.

Loring v. Manufacturers Insurance Co.

Fire insurance — Condition — Sale of property — Evidence.

The defendants issued a policy to A. "on his interest, being one half," in a certain mill. If the property should be sold or conveyed, the policy was to be void, and the company would, on request, repay a portion of the premium; "or the policy may continue for the benefit of such purchaser, if this company give their consent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." The plaintiff was mortgagee of the half of the mill thus insured, and A. signed, and the defendants assented to the following indorsement on the policy: "In case of loss, pay the within to Josiah Q. Loring, Esq., [the plaintiff,] to secure his mortgage." The assured afterwards sold and conveyed all his interest in the mill to a third person:

Held, that the plaintiff could not recover of the company, for the assignment to him was only of the right of A., which was gone by his conveyance of the property.

Soon after the above mentioned policy was made, A. bought another undivided portion of the mill, and took out another policy at the office of the defendant company on that interest, which was three tenths. When the mill was sold, an indorsement was made on this second policy, reciting the sale of "the within insured property," and assigning the policy to the purchaser, which assignment was assented to by the defendants.

Held, that the indorsement on this second policy, and the assent of the defendants to the assignment, could only refer to the undivided interest insured by that policy, and not to the interest mentioned in the first policy.

Nor would parol evidence of notice and assent be admissible, for the policy prescribes the evidence necessary to be given of such assent and notice.

G. W. Phillips, for plaintiff.

E. D. Sohier and *C. A. Welch*, for defendants.

Williams v. Cheney.

Same v. Heath.

Premium notes — Foreign corporations.

In a suit on premium notes given by the defendant, a resident of Massachusetts, on policies issued in Massachusetts by a foreign corporation, there doing business, the defence was that the corpo-

ration had not complied with the statutes of Massachusetts regulating such corporations. The policies were issued to the defendant "for whom it may concern," and made payable in case of loss to the defendant.

Held, that it was not a good reply to this defence, that the defendant was in fact only an agent for persons living out of the State, who had furnished him with funds to pay the notes.

H. Jewell, for plaintiff.

C. E. Pike and *B. Dean*, for Cheney.

I. J. Thomas, for Heath.

Thayer *v.* Taft.

Trustee process — Verdict in action of tort.

The city of Boston was sued in an action of tort, for damages caused to one Southwick, by defect in a highway. After verdict for the plaintiff and before judgment, the city was summoned as trustee of Southwick.

Held, that these facts did not make the city liable as trustee; for there was not, properly speaking, any "debt" before judgment.

G. W. Searle and *G. W. Adams*, for plaintiff.

J. P. Healey, (City Solicitor,) for trustee.

Loring *v.* Folger.

Judgment against party deceased — Trustee process.

Suit was brought against an absent defendant, and his goods were attached in the hands of a trustee; judgment was recovered in due form, and the trustee satisfied the same. It turned out that the defendant had died before the commencement of the suit.

Held, that the judgment was wholly void, and could not be set up by the trustee, in answer to an action against him by the administrator of the original defendant.

E. D. Sohier and *C. A. Welch*, for plaintiff.

H. Jewell, for defendant.

Greenough *v.* Whittemore.

Insolvent debtors — Adjournment of meeting.

St. 1838, c. 163, § 7, provides for the holding of a second meeting of the creditors of every insolvent debtor, at which meeting the debtor is to take an oath in form therein prescribed, as to the disposal of his effects, &c., as preliminary to a discharge. In this case the second meeting was adjourned "to the time and place

of holding the third meeting," the third meeting not having then been ordered. The third meeting was afterwards duly ordered and notified, and the debtor was then and there admitted to take the oath, and a certificate of discharge was granted him.

Held, that the adjournment, being to a time and place not then ascertained, was insufficient, and the discharge was not valid.

S. Albee, for plaintiff.

Ranney and *Morse*, for defendant.

Shed *v.* Tileston.

Poor debtor — Notice to take the oath — Misdescription.

In a notice to the creditor of the debtor's intention to take the poor debtor's oath, the execution was described as issued from the court of common pleas holden at Lowell, in the county of Middlesex, whereas it was in fact issued from the court of common pleas holden at Boston, for the county of Suffolk.

Held, a fatal variance.

B. Dean, for plaintiff.

J. C. Park and *A. Russ*, for defendant.

Plummer *v.* Odiorne.

Poor debtor — Discharge on ninety-first day.

A poor debtor committed on execution, was admitted to take the oath on the ninety-first day after his commitment, and on the same day a certificate of discharge was made and filed with the jailer.

Held, that the discharge was seasonable, and the bond for prison limits was not forfeited.

B. Dean, for plaintiff.

I. Story, for defendant.

Corcoran *v.* Henshaw.

Contract — Order for delivery of scrip — Construction — Warranty — Tender.

The defendant being entitled to receive of the trustees of an incorporated canal company, a large amount of the bonds of the company, gave to the plaintiff an order on the trustees, as follows:

"Boston, January 24, 1850.

Please deliver to Messrs. Corcoran and Riggs, or order, bonds of the —— Co., to the amount of twenty-three thousand dollars, which I am now entitled to receive under my subscription for $100,000, on his paying you therefor sixty cents on the dollar.

David Henshaw.

To Nathan Hale and others, trustees, &c."

This order was accepted by the trustees. The plaintiff was to pay for the bonds at the rate of 85½ cents on the dollar, namely, sixty cents to the trustees, and the balance (amounting to $ 5865) to the defendant. A bill of sale was made out by the defendant to the plaintiff, showing the transaction, and at the bottom was this memorandum: "It is understood that if the above bonds are not delivered by the trustees, first week in March, that I am to account to (plaintiff) for the interest on said premium on ($5865) after said time, until said bonds are delivered."

Only $ 5000 were ever delivered by the trustees. Two suits were brought by the plaintiff; one to recover interest on the $ 5865, and the other to recover back the premium and interest, on the ground of a warranty that the bonds should be delivered by the trustees. After the first suit was brought and before the second, the defendant offered to deliver to the plaintiff an amount of bonds of the company sufficient to make up the $ 23,000, if he would pay the stipulated price of sixty cents on the dollar therefor, which offer he declined.

Held, that the contract was only for a sale of the defendant's right to receive the bonds from the trustees, and contained no warranty that such a number should be actually delivered.

Held, also, that the tender would stop the running of the interest.

C. P. Curtis and *C. P. Curtis, Jr.*, for plaintiffs.

W. Whiting and *W. G. Russell*, for defendants.

Merriam v. Granite Bank.

Promissory note taken under suspicious circumstances.

The plaintiff's clerk accidentally left a promissory note on the counter of a broker, by whom, before it was due, it was pledged to a bank, as collateral security for a loan, though under what precise circumstances could not be ascertained. An officer of the bank, who had charge of this part of its business, testified that the bank had large transactions with the broker, and often lent him money on demand, taking notes in pledge, that the witness always supposed these notes to be notes which were pledged to the broker by other parties, and not the absolute property of the broker. The witness remembered nothing about the note in suit.

Held, that if the bank took the note, not in the usual course of business, but under such circumstances as to cast a shade upon the transaction, and to put them on inquiry, their title would not prevail against the plaintiffs, who were the true owners; and further, that the circumstances testified to by the officer were sufficient to cause suspicion and inquiry.

H. F. Durant, for plaintiff.

C. T. Russell, for defendant.

SHEPHERD *v.* CHAMBERLAIN.

Promissory notes — Demand at a Bank.

Where a note is made payable at a certain bank, a demand of payment made at the bank after business hours, on the last day of grace, but while the bank is still open, with officers present attending to its business, is a sufficient demand on which to notify and charge the indorser.

H. L. Hazelton, for plaintiff.

F. W. Sawyer, for defendant.

BLAKE *v.* SANBORN.

Mortgage — Action to foreclose — Survivorship.

Where a mortgage was made to four persons, to secure the payment of a note made to them or their order, and an action was brought in the name of the four to foreclose, and one afterwards died:

Held, that the survivors might prosecute the action to judgment, without joining the administrator of the deceased mortgagee.

J. A. Loring, for plaintiffs.

G. E. Betton, for defendant.

PLUMMER *v.* GRAY.

Money lost by gaming — Limitation implied.

Rev. Sts. c. 50, § 12, provide that any person losing money by gaming, may recover the same of the winner, in an action for money had and received; and if the person, so losing, "shall not, within three months after such loss, without covin or collusion, prosecute with effect for such money or goods, it shall be lawful for any other person to sue for and recover treble the value of such money," &c., one moiety to the use of the person prosecuting, and the other to the use of the Commonwealth.

Held, that the action by the party himself must be brought within three months.

W. L. Burt and *C. S. Lincoln*, for plaintiff.

No appearance for defendant.

PRENTICE *v.* RICHARDS.

Insolvent debtor — Necessaries.

The defendant was a widow without children or a family; she kept a boarding-house as a business, and as her sole means of support; she had a large parlor, used for the boarders, and where she was accustomed to sit with them; there was no sitting room appropriated to her sole use.

Held, that the rent of this house was not "a claim for necessaries furnished to the debtor or his family," under St. 1848, c. 304, § 10, which exempts such claims from discharge under the insolvent laws.

J. A. Abbott, for plaintiff.

G. W. Searle, for defendant.

GANNON *v.* ADAMS.

Imprisonment — "Fine and costs only."

Rev. Sts. c. 145, § 3, provides for the discharge of convicts who have been confined in prison for three months, "for fine and costs only," if proved to be unable to pay the sum for which they are committed. The plaintiff was convicted of being a common seller of intoxicating liquors, and sentenced to pay a fine of fifty dollars and the costs of prosecution, and to be imprisoned in the house of correction three months, and to stand committed in pursuance of the sentence.

Held, that the space of three months, mentioned in the above cited section, must begin to be computed after the expiration of the time for which the plaintiff was sentenced to be imprisoned.

HAPGOOD *v.* DOHERTY.

Jurisdiction of justices' courts — Trial by jury.

The jurisdiction of justices' courts is extended by St. 1852, c. 314, § 1, "to all cases wherein the debt or damages demanded do not exceed the sum of one hundred dollars." An action of contract was brought in the justices' court for Suffolk county, in which the sum of $200 was ordered to be attached, and the declaration was on an account annexed, showing a debt of $123.06, but the *ad damnum* was laid at $100. Defendant pleaded to the jurisdiction, but the court gave judgment for the plaintiff for $100. There was no express remitter of the excess.

Held, that the justices' court had jurisdiction. Also, that this section does not infringe the constitutional guarantee, giving parties "a right to a trial by jury," although if the judgment of the justices be against the defendant, he may be obliged to give security for the prosecution of his appeal and for costs.

P. Willard, Jr., for plaintiff.

B. Dean, for defendant.

BROWN *v.* TYLER.

Collateral security — Mortgage.

A mortgagee assigned his mortgage to B., as collateral security

for a debt due from a third person to B. The assignee foreclosed the mortgage, and some time after the foreclosure, sold the land.

Held, that the debt as collateral to which the mortgage was assigned, was not paid by the foreclosure, but only by the actual sale and conversion into money of the property held as collateral.

S. Bartlett and *G. S. Hale*, for plaintiff.

C. B. Goodrich and *J. W. May*, for defendant.

Savory v. Clements.

Contract of seamen.

Desertion of a seaman is no defence to an action for his wages, if the vessel was unseaworthy.

A. B. Davis, for plaintiff.

P. S. Wheelock, for defendant.

McGilvery v. Capen.

Charter party — Freight.

By charter-party the defendants hired a vessel for a certain time, and agreed to pay freight at a certain rate per ton, for each calendar month the vessel might be employed by them, and at the same rate for any part of a month, payments to be made as follows: at the end of every six months defendants were to pay "three months charter," at Boston, "and the balance to the master as it should become due, on discharge of the vessel at the several ports she may discharge at." The vessel was lost in the course of one of the voyages.

Held, that freight was due to the time of loss.

W. Brigham, for plaintiff.

R. Choate and *E. Bangs*, for defendant.

Clay v. Brigham.

Practice Act — Declaration in Slander.

A declaration in slander alleged that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff substantially as follows: "She is dishonest." No demurrer was filed by the defendant.

Held, that the plaintiff might show that the words were spoken in such connection and under such circumstances as to amount to a charge of the crime of larceny; and that an objection that the words set out were insufficient to support the allegation, was one which must be taken by demurrer.

J. C. Park and *A. Russ*, for plaintiff.

C. P. Hinds and *W. Tilton*, for defendant.

COMMONWEALTH *v.* TIVNON.

Joint possession of implements of burglary.

Indictment under St. 1853, c. 194, against two persons for having in their possession certain enumerated tools and implements, designed and adapted for breaking open houses &c., knowing them to be so adapted and designed, and with intent to use them for the purposes aforesaid : —

Held, 1. "Their" possession and intent is a sufficient allegation of a joint possession and interest.

2. It is sufficient to allege that the instruments were adapted and designed for the purposes set forth, without alleging that each instrument was adapted for all the purposes.

3. It is not necessary to describe the building upon which the instruments were designed to be used, nor to name the owner thereof.

4. A common enterprise and joint intent being proved, the declarations and acts of one defendant in pursuance of the enterprise are evidence against both.

5. It is not necessary to prove that the instruments were originally adapted and designed for the felonious purpose, but only that they were suitable for that purpose and intended to be so used.

6. An actual or constructive possession by both defendants must be proved. This will be done by showing a possession by one in behalf of both, but not by showing a possession by one, and only a joint intent as to the use of the instruments.

J. H. Clifford, (Attorney General,) for Commonwealth.

J. H. Bradley, for defendant.

COMMONWEALTH *v.* TOLLIVER.

Indictment — Plea.

Indictment for an assault in Boston is sustained by proof of an assault in Chelsea in the same county.

J. H. Clifford, (Attorney General,) for Commonwealth.

S. D. Parker, for defendant.

LONG POND MUTUAL FIRE INS. CO. *v.* HOUGHTON.

Mutual fire insurance companies — Assessments — Deposit notes.

Assessments for losses incurred by mutual fire insurance companies must be made upon those who are members when the loss occurs ; and where it appears that this rule has not been substantially complied with, the assessment will be considered void.

A mutual fire insurance company may legally make a bye-law, that deposit notes shall be considered part of the absolute funds of the company, to be applied to the payment of the expenses of

the company and of losses generally, whether such as might be the subject of assessment to the person giving the note or not.

J. P. Healey, for plaintiff.

Elliot v. Hayes.

Wager — Guaranty of dividends.

The defendant's intestate, by a contract in writing, "guaranteed and assured" to the plaintiffs that the dividends on certain railway shares, held by the plaintiffs, should amount to five dollars a share, annually, for ten years, and the plaintiffs, in consideration of this guaranty, agreed to pay the defendant's intestate any excess of dividends over said amount, during said term.

Held, a valid contract and not a mere wager.

H. C. Hutchins, for plaintiffs.

C. F. Choate, for defendant.

Commonwealth v. Anthes.

Province of the jury in criminal cases.

St. 1855, c. 152, provides that it shall be the duty of the jury in criminal cases, to "try according to established forms and principles of law all causes which shall be committed to them, and after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict, at their election," &c.

Upon the question whether this statute purports to change the law as already existing, and recognized in *Commonwealth* v. *Porter*, 10 Met. 263, the court were equally divided.

But by a majority of the court it was *held*, that if such change of the law is contemplated by the statute, the same is void.

J. M. Keith, for Commonwealth.

J. W. May, for defendant.

Intelligence and Miscellany.

JUDICIAL RESIGNATIONS. — The resignation of Judge Curtis of his place on the bench of the supreme court of the United States, has taken the bar and the public by surprise. Appointed about six years since, he has served with eminent fairness and ability, and with constantly increasing reputation; and as he is still in the vigor of his powers, his future career was looked to with great expectation. It was hoped that he would add another to the great judicial names of our history, and leave upon our jurisprudence the firm impress of his talents, learning, and judicial discrimination. These hopes are forever destroyed by the step now announced as irrevocably taken. The motive generally assigned is the inadequacy of the salary; but the salary has been raised one third since Judge Curtis took office; and the United States are rich, and not parsimonious; there is no reason to doubt their readiness to keep the standard of public salaries on a level with the increasing demands of the times. Whatever may have been the private disadvantages and discomforts of the position, we cannot but wish that the eminent and learned judge could have borne them a little longer for the sake of the public good.

Many gentlemen have been named as possible successors to the vacant seat, of whom three would fill the place with undoubted ability and learning. We refer to Judge Gilchrist, of the court of claims, Mr. Cushing, late Attorney General of the United States, and Mr. Goodrich of this city.

It is rumored also that Judge Abbott of the superior court of Suffolk county Massachusetts, intends to return to the bar. In his case the rumor does not appear to be derived from the most authentic source, and we sincerely hope it is unfounded. No doubt Judge Abbott's salary is less than it should be, and less than he can earn at the bar, but the acceptance of a place on the bench raises an implied promise to keep it for a reasonable time. We submit to his Honor that two years is not quite a reasonable time.

A MODEL BANKRUPT. — In a recent case before Mr. Commissioner Hill, of Bristol, England, it appeared that not a single creditor had proved his debt. The unsecured debts appeared by the schedule to amount to 13*l.* 11*s.* 2*d.*, and the assets to 40*l.*; there were secured debts for 102*l.* 10*s.* The petitioning creditor had security which he must have given up if he had proved his debt. The learned Commissioner granted a certificate of discharge of the first class.

CURIOUS MISTAKE IN A TRIAL FOR MURDER. — At the last York assizes Ann Edmonson was indicted for the murder of her infant child, and counsel was assigned to her by the court. On being called upon to plead, she sobbed out "guilty," which was erroneously taken down as "not guilty" and she was tried and acquitted; after which the mistake was discovered, but fortunately for her too late to affect the result.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Atwood, Benjamin Y. } (a)	Chelsea,	July 2, 1857.	Isaac Ames.
" Payne G. }			
Baker, Daniel C. } (b)	Lynn,	" 6,	Henry B. Fernald.
" Ezra }			
Barnes, David C. (c)	Boston,	" 27,	Isaac Ames.
Bazin, F. O. J. S. (d)	Boston,	" 30,	Isaac Ames
Belmonte, Adolphus	Boston,	" 15,	Isaac Ames.
Bracket, Henry (c)	Boston,	" 27,	Isaac Ames.
Bradford, Rufus B. (e)	Boston,	" 31,	Isaac Ames.
Bramhall, Thomas M. (f)	Brookline,	" 21,	Isaac Ames
Brown, Wm. H. (d)	New York,	" 30,	Isaac Ames.
" Wm. J.	Groveland,	" 8,	Henry B. Fernald.
Bryant, David	Boston,	" 14,	Isaac Ames.
Cook, James, Jr.	Hadley,	" 6,	Horace I. Hodges.
Crocker, Charles	Barnstable	" 22,	Simeon N. Small.
Crown, Lyman P. (g)	Chelsea,	" 21,	Isaac Ames.
Currier, David	Salem,	" 18,	Henry B. Fernald.
Day, James P.	Boston,	" 13,	Isaac Ames.
Dodge, Luke E.	Salem,	" 27,	Henry B. Ferna'd.
Emerson, Edward	Boston,	" 18,	Isaac Ames.
Emery, Aaron F. (h)	Boston,	" 23,	Isaac Ames.
" Caleb S. (g)	Roxbury,	" 21,	Isaac Ames.
French, John A.	Somerville,	" 6,	Isaac Ames.
Gove, Moses J.	Malden,	" 20,	Isaac Ames.
Harris, Leopold	Boston,	" 14,	Isaac Ames.
Hassard, Jonathan N.	Boston,	" 21,	Isaac Ames.
Hendley, Otis H.	Cambridge,	" 10,	L. J. Fletcher.
Hinkley, Benjamin H.	South Reading,	" 27,	L. J. Fletcher.
Houghton, Edwin F. } (h)	Boston,	" 23,	Isaac Ames.
" Francis A. }	Boston,	" 23,	Isaac Ames.
Jennings, Edwin (c)	Boston,	" 27,	Isaac Ames.
Johnson, Albert F. (h)	Boston,	" 23,	Isaac Ames.
Leland, Charles H.	Upton,	" 2,	Alexander H. Bullock.
Leslie, Wm. H. (i)	North Andover	15 & 20,	Henry B. Fernald.
Lincoln, Anson N.	Charlestown,	" 6,	L. J. Fletcher.
Loring, Hollis	Marlboro',	" 10,	L. J. Fletcher.
Macomber, Wm. (e)	Boston,	" 31,	Isaac Ames.
Marshall, John W. (j)	Boston,	" 15,	Isaac Ames.
McDonnell, Michael	Boston,	" 15,	Isaac Ames.
Morse, Richard D. (d)	Newton,	" 30,	Isaac Ames.
Nickerson, Charles	Provincetown,	" 27,	Simeon N. Small.
Peabody, Henry (i)	North Andover,	15 & 20,	Henry B. Fernald.
Peakes, Benjamin F.	Brighton,	" 13,	Isaac Ames.
Pierce, Horace } (k)	Royalston,	" 14,	Alexander H. Bullock.
" Milo H. }			
Ryan, Pierce H.	Boston,	" 18,	Isaac Ames.
Sampson, Hilman B. (f)	Boston,	" 21,	Henry B. Fernald.
Sawyer, James B.	Lynn,	" 22,	Isaac Ames.
Shaw, George A. (f)	Boston,	" 21,	Isaac Ames.
Stone, Charles C.	Marlboro',	" 17,	L. J. Fletcher.
Stone, George W. (l)	Lowell,	" 8,	L. J. Fletcher.
Tebbetts, Temple (l)	Lowell,	" 8,	L. J. Fletcher.
Thayer, Jason	Milton,	" 25,	Francis Hilliard.
Train, Samuel F.	Roxbury,	" 30,	Isaac Ames.
Travis, George C.	Holliston,	" 25,	L. J. Fletcher.
Tripp, Abel W.	New Bedford,	" 20,	Joshua C. Stone.
Turner, Thomas Larkin	Boston,	" 28,	Isaac Ames.
Twichell, Francis	Templeton,	" 17,	Alexander H. Bullock.
Wallcott, Henry S. (j)	Boston,	" 15,	Isaac Ames.
Weaver, Caleb G.	Lowell,	" 2,	L. J. Fletcher.
Wellcome, Abner P.	Randolph,	" 23,	Francis Hilliard.
Whiting, Ephraim W.	Boston,	" 13,	Isaac Ames.
Willmarth, Ezra	Reading,	" 1,	L. J. Fletcher.
Witherbee, Wm. W.	Marlboro',	" 21,	L. J. Fletcher.

(a) B. Y. Atwood & Co.
(b) Baker & Brother.
(c) Barnes, Jennings & Co
(d) Bazin, Morse & Co.
(e) Bradford & Macomber.
(f) Shaw, Sampson & Bramhall.
(g) Crown & Emery.
(h) Emery, Houghton & Co.
(i) Peabody & Leslie, recorded at two dates.
(j) Marshall & Wallcott.
(k) Horace Pierce & Son.
(l) George W. Stone & Co.